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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CARTER-GLOGAU LABORATORIES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CURCUIT

SNELL & WILMER
3100 Valley Bank Center
(602) 257-7362
Phoenix, AZ 85013

Gerard Morales
Counsel of Record
Thomas J. Kennedy
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QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board (the "NLRB" or "Board") may, consistent with its own precedent, precedent of the Second, Ninth and Tenth Circuit Courts of Appeals and Sections 7 and 9 of the National Labor Relations Act, as amended, (29 U.S.C. § 157, 159) refuse to consider relevant evidence of objectionable pre-petition conduct destructive of the requisite laboratory conditions essential to the holding of an NLRB conducted election.

LIST OF PARTIES TO PROCEEDING BELOW

The parties to the proceeding below are:

1. Carter-Glogau Laboratories, Inc.;

2. Revco D. S., Inc., the parent corporation of Carter-Glogau Laboratories, Inc.;

3. The National Labor Relations Board;

4. Construction, Production and Maintenance Laborers Local Union 383, Laborers International Union of North America, AFL-CIO.

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JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed and entered its Judgment in this matter on March 14, 1984, enforcing a bargaining order of the National Labor Relations Board. Carter-Glogau Laboratories, Inc., Petition for Rehearing/Suggestion for Rehearing En Banc was denied on June 25, 1984 and this petition for certiorari was filed withing 90 days thereafter.

Pursuant to Section 10(e) of the National Labor Relations Act as amended (29 §160 (e)) and 28 U.S.C. §1254(1)), this Court has jurisdiction to review the Judgment and Order upon writ of certiorari.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§157

"Employees shall have the right to self-organization , to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

§159(a)

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees

in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

STATEMENT OF THE CASE

On March 27th, 1981, Daniel R. Goold, a bargaining unit employee, employed by Carter-Glogau Laboratories, Inc., ("Carter-Glogau") filed a decertification petition with the National Labor Relations Board in Case No. 20-RD-379. In essence, the petition sought an election to determine whether the Union had the support of the majority of the unit employees. (R. 1) 1/

On July 1, 1981 the National Labor Relations Board, pursuant to a Decision and Direction of Election issued by the Regional Director, (R. 7) conducted a decertification election among certain employees of Carter-Glogau included within the unit found appropriate by the Regional Director. (R. 15) By a vote of sixty-five to fifty-five the

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1/ References to the Agency Record were made as follows: "R, followed by the item number within that Record. If there are numerous pages in a single document and the reference is to only one particular page, the page number will follow the item number, e.g. "R. 1, P. 1".

employees rejected the Union. However, there were twenty-eight challenged ballots as well as objections to conduct affecting the results of the election, which were filed by the employer and the Union.

On July 15, the Regional Director ordered a hearing to resolve the issues raised by the objections and challenged ballots. On August 20, 1981, the Hearing Officer issued a Hearing Officer's Report and Recommendations on Determinative Challenged Ballots and Objections to Conduct Affecting the Results of the Election (App. 48a)[2/] The Report dismissed the objections filed by the Union and employer and overruled the challenges to all twenty-eight ballots. (App. 48a)

On September 18, 1981 the Regional Director issued a Supplemental Decision and Order on Determinative Challenged Ballots and Objections to Conduct Affecting the Results of

[2/] References to the Appendix will be designated "App." followed by the appropriate page (P.") number or numbers.

the Election. (App.27a) The Regional Director adopted the Hearing Officer's recommendations regarding the disposition of objections filed by both the Union and the employer. Of particular significance, the Regional Director stated as follows: "While the employer requests that the undersigned take administrative notice of a pending unfair labor practice proceding, case 20-CB-1710 in which it has been alleged that the Union herein has engaged in certain strike misconduct at the employer's premises, it should be noted that all the unlawful conduct alleged therein occurred prior to the filing of the petition herein, and several months prior to the date of the election. Accordingly, such alleged conduct could not and did not interfere with the conduct of the election herein." (App.37a) At the time that the Regional Director made these comments, the decision of the Administrative Law Judge had not yet issued. The decision of the National Labor Relations Board, affirming in

all relevant regards the decision of the Administration Law Judge, was rendered on March 30, 1982. Construction, Production and Maintenance Laborers Local 383, 260 NLRB 1340 (1982). These then allegations were found by the National Labor Relations Board itself to be violations of the Act (29 U.S.C. § 151 et. seq) committed by the Union.

Though at the time the Supplemental Decision issued, the determination of the Administrative Law Judge on the Union's unfair labor practices had not been issued, the Regional Office had issued a complaint and notice of hearing on January 21, 1981. (R. 48) Therefore, the Regional Office had reasonable cause to believe that such violations had been committed. To remove any lingering doubt regarding the Union's commission of these incidents of misconduct, the Union had stipulated to the facts, which formed the underpinnings of the decision of the Administrative Law Judge finding violations, during

the course of the hearing conducted on August 11, 1981. Hence, this persistent and unremitting pattern of Union misdeeds was before the Regional Director prior to this Supplemental Decision, issued on September 18, 1981, refusing to consider these incidents.

However, the Regional Director did not adopt the recommendations of the Hearing Officer concerning challenged ballots in their entirety, rather, he found merit in employer's exceptions to the Hearing Officer's recommendations that the challenges to the ballots cast by Marvin Pierce, Rolene Wilshusen, Deborah Brink, and Frederick LaMarche be overruled. (App.46a-47a) Accordingly, the Regional Director ordered that the challenged ballots of those employees be sustained. (App.46a-47a) All other challenges were overruled. (App.46a)

On October 16, 1981, Carter-Glogau filed a Request for Review with the NLRB of the determinations made below by the Hearing Officer and Regional Director relative to elec-

tion objections and challenged ballots made by the employer. (R. 32) On March 4, 1982, the NLRB denied the employer's request for review except as to the "substantial" issue raised relative to the ballots of Pierce, Wilshusen, Brink and LaMarche. (R. 39)

On April 1, 1982, the NLRB issued a revised tally of ballots. (R. 43) The revised tally of ballots included the heretofore segregated challenged ballots except for the four ballots around which a "substantial issue" had been raised, namely, the ballots of Pierce, Wilshusen, Brink and LaMarche. The revised tally of ballots indicated that of the 148 ballots cast, seventy-seven were cast for the Union and sixty-seven against the Union. (R. 43) Four challenged ballots remained uncounted as non-determinative. Thereafter, the Union was certified on April 9, 1982 as the exclusive collective bargaining agent of all employees in the appropriate bargaining unit. (R. 44)

On or about April 19, 1982, the Union requested Carter-Glogau to bargain with it as the exclusive bargaining agent of all employees in the appropriate bargaining unit. On or about April 28, 1982, Carter-Glogau refused to bargain, notified the Union's counsel that it was doing so "inasmuch as the majority of its employees voted last July that they did not wish to be represented by said labor organization despite repeated incidents of objectionable conduct committed by Union officers. We are sure that you understand that the employer must comply with the wishes of its employees and may not act in accordance with the wishes of individuals employed elsewhere." (R. 48, Exhibit "B") Thereafter, the Board issued an unfair labor practice complaint against Carter-Glogau on May 13, 1982. (R. 48)

On June 4, 1982, Carter-Glogau answered the complaint. On August 9, 1982 the Board granted the motion of the General Counsel to

transfer and continue the matter before the Board and for summary judgment. On October 15, 1982, the Board issued its Decision and Order finding that Carter-Glogau had engaged in unfair labor practices by declining to recognize and bargain with the Union and ordered certain remedial action be taken by the employer including bargaining with the Union as the exclusive bargaining representative of all employees in the appropriate unit. (App. 6a)

Carter-Glogau thereafter filed a petition for review with the Court of Appeals for the Ninth Circuit. This petition was filed on February 14, 1983 pursuant to 29 U.S.C. § 160(f). An application for enforcement by the NLRB was filed on or about February 3, 1983 pursuant to 29 U.S.C. §160(e). On or about March 14, 1984, a panel of the Court of Appeals for the Ninth Circuit enforced the order of the National Labor Relations Board. (App. 1a) Thereafter, on March 27, 1984,

Carter-Glogau filed a Petition for Rehearing/ Suggestion for Rehearing En Banc.

Later, on April 25th, 1984, Carter-Glogau moved the Court of Appeals for the Ninth Circuit for leave to file an amended petition in order to bring to the court's attention a recent NLRB decision known as YKK (U.S.A.) Inc., 269 NLRB No. 8 (1984).

On June 25, 1984, the Court of Appeals for the Ninth Circuit issued an order denying petitioner's motion for leave to file an amended petition, for rehearing, and rejecting the suggestion for rehearing en banc. (App.113a) However, Judge Anderson dissented from the denial of petitioner's motion to file an amended petition for rehearing. (App.114a) Judge Anderson would have granted that motion, would have granted rehearing by the panel, denied enforcement, and remanded to the Board for reconsideration in light of its decision in YKK (U.S.A.) Inc., 269 NLRB No. 8 (1984). (App.114a) Judge Anderson also cited to NLRB

v. Anchorage Times Publishing Company, 637 F.2d 1359 (9th Cir. 1981) cert. den. 454 U.S. 835 (1981) as further support for his suggested course of action. (App. 114a)

REASONS FOR GRANTING THE WRIT

Introduction

Federal labor law in the area of misconduct committed prior to an NLRB conducted election is currently unsettled, offering no predictability to the parties. The disquieting dissaray in this area is the direct result of NLRB vacillation on the question of whether relevant evidence pertaining to electoral misconduct interfering with the exercise of employee free choice and disruptive of the NLRB's self-created "laboratory conditions" standard shall be excluded, at times, simply because the electoral misconduct occurred prior to the filing of an election petition. General Shoe Corporation, 77 NLRB 124 (1984). For example, the lingering coercive effects of unfair labor practice activity committed in the period immediately preceding the filing of the election petition are considered by the NLRB and the courts alike in both representation and unfair labor practice case set-

tings but inexplicably not in the instant case. YKK (U.S.A.) Inc., 269 NLRB No. 8 (1984); Blue Bird Body Company, 251 NLRB 1481 (1980); Lyons Restaurant, a wholly owned subsidiary of Consolidated Foods Company, 234 NLRB 178 (1978); Baker Machine & Gear, Inc., 220 NLRB 194 (1975); Servomation of Columbus, Inc., 219 NLRB 504 (1975); Willis Shaw Frozen Express, Inc., 209 NLRB 267, 268 (1974); Weather Seal Incorporated, 161 NLRB 1226, 1228-29 (1966); NLRB v. R. Dakin and Company, 477 F.2d 492 (9th Cir. 1973); NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359 (9th Cir. 1981) cert. den. 454 US 835 (1981); NLRB v. Lawrence Typographical Union, 376 F.2d 643 (10th Cir. 1967); Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB, 589 F.2d 1166 (2d Cir. 1978); NLRB v. L. B. Foster, 418 F.2d 1 (9th Cir. 1979); NLRB v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1967);Conair Corp., 261 NLRB 1189 (1982) enf. den. in rel. part Conair v. NLRB 721 F.2d

1355 (D.C. Cir. 1983); and United Dairy Farmers Cooperative Association, 257 NLRB 772 (1981).

The NLRB itself does not rely upon a mechanical application of its intermittently invoked "rule" barring consideration of pre-petition proof. Rather, the NLRB generally proceeds on a case by case basis in the representation case area examining the facts surrounding the conduct of the election is determining whether the election should be set aside because of the coercive impact of unfair labor practice activity or other objectionable conduct. 1979 NLRB Annual Report (U.S. Government Printing Office, 1978) at p. 70. Similarly, at least three appellate courts have expressly considered pre-petition misconduct in determining whether an NLRB election should be overturned. NLRB v. R. Dakin and Company, supra.; NLRB v. Anchorage Times Publishing Co., supra.; NLRB v. Lawrence Typographical Union, supra.; Catholic Medical

Center of Brooklyn and Queens, Inc. v. NLRB, supra. On the other hand, the Fifth Circuit has sanctioned the NLRB pre-petition exclusionary rule thereby creating an inter-circuit conflict. See NLRB v. Golden Age Beverage Co., 15 F.2d 26 (5th Cir. 1959).

Here, however, the error of the NLRB in choosing these facts to selectively apply its pre-petition exclusionary "rule" is compounded by the Court of Appeals for the Ninth Circuit enforcing the order of the NLRB, contrary to its own intra-circuit precedent. NLRB v. R. Dakin and Company, supra.; NLRB v. Anchorage Times Publishing Co., supra.

There are literally thousands of NLRB elections conducted annually. (Labor Relations Yearbook 1982, (B.N.A. 1983)). The current state of the law, beset as it is by uncertainty and unpredictability born out of the lack of uniformity in the consideration of proof of electoral misconduct, invites increased litigation. Relevancy, not an arbi-

trary cut-off date, should be the bench mark for the evidentiary submissions made by the parties in post-election objection proceedings. As the Ninth Circuit has held, the "rule" barring consideration of pre-petition electoral misconduct is really merely an "evidentiary device". NLRB v. R. Dakin and Company, supra. This approach gives full play to the Section 7 and 9 rights of employees (29 U.S.C. § 157, 159) so that they may enjoy the full exercise of their rights of free choice untrammelled by coercive unfair labor practice activity, as occurred herein.

To redefine and clarify this body of law, avert more litigation by creating certainty where ambiguity now reigns, and to resolve the inter-circuit conflict indicated above, this court should assume its jurisdiction to decide this pivotal question of employee rights.

Argument

THE DECISION BELOW AFFIRMING AN NLRB ORDER IS IRRETRIEVABLY AT WAR WITH NLRB PRECEDENT, PRECEDENT IN THE NINTH CIRCUIT, AND PRECEDENT IN OTHER CIRCUITS.

There is an irreconcilable conflict between this decision, decisions of the courts of appeals, and the National Labor Relations Board. This has created a welter of unpredictability and confusion in this area of the law. This confusion and uncertainty centers on the NLRB's sometime practice of excluding relevant evidence in ascertaining whether the NLRB's requisite laboratory standards for an election have been satisfied.

The employees right of self-determination set forth in Section 7 of the National Labor Relations Act (29 U.S.C. § 157) has been accurately termed "one of the principal policies of the national labor laws" Carpenters Local Union 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 512 (5th Cir. 1982) cert.

den.____US____, 104 S.C. 335, 78 L.ed.2d 305 (1984). Representational questions inherently implicate this "principal policy" and are accordingly treated with great care by the courts and the National Labor Relations Board. Indeed, the National Labor Relations Board has declared:

> "[I]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees"

General Shoe Corporation, 77 NLRB 124 (1984).

The Board's policy of conducting its elections only under "laboratory conditions" has resulted in the invalidation of elections and direction of reruns where electoral conduct has fallen short of this high standard. Sewell Manufacturing Co., 130 NLRB 66 (1962). Tactics which can destroy the requisite "laboratory conditions" include the creation of a general atmosphere of fear and coercion by a party to the election or even by members of

the general public. Sewell Manufacturing Co., supra.; Universal Manufacturing Co., 156 NLRB 1459 (1966).

Similarly, in election cases involving allegations of pro-Union coercion, a court will reverse the NLRB's decision to certify a victorious Union where the activities of Union supporters created an atmosphere of fear and coercion rendering a free and fair election impossible. NLRB v. Advanced Systems, Inc., 681 F.2d 570, 575 (9th Cir. 1982); Beaird-Poulan Division, Emerson Electric Co. v. NLRB, 715 F.2d 291, 296 (7th Cir. 1983); Daylight Grocery Co. v. NLRB, 678 F.2d 905, 909 (11th Cir. 1982). Here, the court failed to overturn the NLRB certification of the Union, notwithstanding a pervasive pattern of Union unfair labor practice activity in the pre-election period.

Indeed, in Construction, Production and Maintenance Laborers Local 383, Laborers International Union of North America, AFL-CIO,

260 NLRB 1340 (1982) the Board found that this same Union had committed no fewer than twenty-six unfair labor practices including repeated threats, including one to blow-up the employer's facility, damage to property, assaults, following and photographing employees, taking employee's license numbers, and sexual harassment. This tidal wave of Union unfair labor practice activity occurred in the pre-election period prior to the July 1, 1981 decertification election, albeit prior to the March 27th, 1981 date of the filing of the decertification petition. One of the multitudinous unfair labor practices -striking an ambulance with a picket sign while it was attempting to exit the premises- occurred on March 13th, 1981, just two weeks prior to the filing of the petition. The NLRB, at least at times, considers the filing of the election petition as marking the cut-off date for considering objectionable conduct to an NLRB conducted election; that is, any conduct which occurs pre-

petition is systematically excluded, at least at times. Ideal Electric and Manufacturing Co., 134 NLRB 1275 (1961); But see YKK (U.S.A.) Inc., 269 NLRB No. 8 (1984); Blue Bird Body Co., 251 NLRB 1481 (1980); Lyons Restaurants, a wholly owned subsidiary of Consolidated Foods Company, 234 NLRB 178 (1978); Baker Machine & Gear, Inc., 220 NLRB 194 (1975); Servomation of Columbus, Inc., 219 NLRB 504 (1975); Willis Shaw Frozen Express, Inc., 209 NLRB 267, 268 (1974); Weather Seal Incorporated, 161 NLRB 1226, 1228-29 (1966).

Accordingly, the court below erred in deciding:

> "The Board's finding that the alleged pre-petition misconduct of the Union provided insufficient basis for overturning the election supported by evidence on the record." (Memorandum Decision, NLRB v. Carter-Glogau Laboratories, Inc., Case No. 83-7092/7124) (App. 1a)

The court also quoted approvingly from NLRB v. Golden Age Beverage Co., 415 F.2d 26, 21 (5th Cir. 1969) for the proposition that pre-

petition conduct is as a matter of law too remote in time to interfere with the employees exercise of free choice.

The appellate court below erred in the above-quoted statement for the reason that the Board did not find the pre-petition misconduct of the Union insufficient as a basis for overturning the election. The Board failed to consider the conduct at all. Indeed, the NLRB decided, as a matter of law, that the entire series of serious, lawless acts, later found to be unfair labor practices (Construction, Production and Maintenance Laborers Local 383, supra.) "could not and did not" interfere with the election. (App. 37a) It is apparent therefore that the NLRB mechanically and reflexively applied its Ideal Electric and Manufacturing Co., supra., "rule" to this particular case.

The outcome in this case is at odds with federal labor policy exalting employee free choice (Section 7 of the Act), (29 U.S.C. §

157) NLRB precedent (YKK (U.S.A.) Inc., supra.; Blue Bird Body Company, supra.; Lyons Restaurant, a wholly owned subsidiary of Consolidated Foods Company, supra.; Baker Machine & Gear, Inc., supra.; Servomation of Columbus, Inc., supra.; Willis Shaw Frozen Express, Inc., supra.; and Weather Seal Incorporated, supra.), Ninth Circuit precedent (NLRB v. R. Dakin and Company, 477 F.2d 492 (9th Cir. 1973); NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359 (9th Cir. 1981) cert. den. 454 US 835 (1981)), the precedent of other circuits (NLRB v. Lawrence Typographical Union, 376 F.2d 643 (10th Cir. 1967); Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB, 589 F.2d 1166 (2d Cir. 1978)) and common sense, see NLRB v. Mr. Porto, Inc., 590 F.2d 637 (6th Cir. 1978).

Because the National Labor Relations Board conducts thousands of elections annually[3/] it is necessary for this Court to

3/ According to Labor Relations Yearbook 1982, (B.N.A. 1983), 5628 NLRB conducted elections were held in fiscal year 1982.

formulate, clarify, or redefine the appropriate period for evaluating relevant evidence in determining whether to set aside an NLRB election. Arbitrarily excluding relevant evidence, as the NLRB did in the instant case, inevitably works at cross-purposes with the goal of creating "laboratory conditions" which have been destroyed by pre-petition misconduct and the NLRB and various federal courts of appeals have so held, as has been demonstrated by the foregoing case law: YKK (U.S.A.) Inc., supra; Blue Bird Body Company, supra.; Lyons Restaurant, a wholly owned subsidiary of Consolidated Foods Company, supra.; Baker Machine & Gear Inc., supra.; Servomation of Columbus, Inc., supra.; Willis Shaw Frozen Express, Inc., supra.; Weather Seal Incorporated, supra.; NLRB v. R. Dakin and Company, supra.; NLRB v. Anchorage Times Publishing Co., supra.; NLRB v. Lawrence Typographical Union, supra.; Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB, supra.

To insure that the requisite "laboratory conditions" are kept inviolate, the NLRB examines each case in which objections are filed:

> ". . . on its facts, taking an ad hoc rather than a per se approach to resolution of the issues." 1979 NLRB Annual Report (U.S. Government Printing Office, 1978) at p. 70.

There is no question that the Union's twenty-six unfair labor practices would have been a more than ample basis to set aside the election conducted on July 1, 1981. Unfair labor practice activity is conduct which interferes with the expression of the employees free choice and destroys the requisite "laboratory conditions". Dal-Tex, 137 NLRB 1782 (1962); Developing Labor Law (B.N.A. 2d.ed. Vol. 1, ed. Morris (1983) at p. 311). For example, in NLRB v. Mr. Porto, supra., the Sixth Circuit held that merely two instances, one involving a Union representative placing nails in an Employer's driveway and the other concerning Union adherents, in the presence of Union representatives, threatening physical violence if an employee did not support the

Union, were unlawful acts and warranted the setting aside of the NLRB election. Here, by sharp contrast, there were numerous and serious unfair labor practices clearly committed by the Union inevitably charging the electoral atmosphere with fear and coercion.

In Weather Seal, Inc., 161 NLRB 1226 (1966), the NLRB demonstrated a fidelity to its self-created standard of "laboratory conditions" for gauging disruption of an election by indicating that it would uphold the integrity of its electoral processes without regard to the timing of any misconduct injurious to the expression of employee free choice. As the Board observed:

> "It is within the province of the Board to set an election aside in order to protect the basic values of the Act even though all the conduct occurred before the petition was filed." Weather Seal, Inc., supra., at p. 1228-1229.

In subsequent case law developments, the Board has adhered to the Weather Seal, Inc., supra. articulation of Board authority. In-

deed, in Willis Shaw Frozen Express, Inc., 209 NLRB 267 (1964), the Board found the exercise of employee free choice impossible in an atmosphere of fear and coercion generated by acts of violence, threats of violence, and confusion arising from a strike and ruled that in the event the counting of challenged ballots did not result in Union victory, the election would be set aside. This decision was predicated in large part on coercive prepetition conduct which could not be ascribed to either party. The instant case is a fortiori Willis Shaw in that the acts of intimidation, threats, coercion, and violence were indisputably attributable to the Union as the NLRB found. See Construction, Production and Maintenance Laborers Local 383, 260 NLRB 1340 (1982). See too Lyons Restaurant, a wholly owned subsidiary of Consolidated Food Company, 234 NLRB 178 (1978); Blue Bird Body Company, 251 NLRB 1481 (1980).

The NLRB in YKK (U.S.A.) Inc., 269 NLRB

No. 8 (1984) explicitly considered pre-petition misconduct in analyzing whether the requisite "laboratory conditions" for an NLRB election had been disturbed. For example, the Board in YKK (U.S.A.) Inc., supra. declared:

> "But to appreciate the full flavor of the atmosphere preceding the election, we have looked at the pre-critical period [pre-petition period] conduct to the extent that it serves as background , giving meaning and dimension to critical period conduct."

And, again, the Board stated:

> "Here, the serious threats and other acts of misconduct, especially in the context of property damage and acts of violence which preceded the critical period, created such fear and anxiety that a fair election could not be conducted. This conclusion is particularly true where -as here- Union agents were directly responsible for certain acts of misconduct". YKK (U.S.A.) Inc., supra.

If the NLRB is attempting to reverse its policy and sub silentio overrule YKK (U.S.A.) Inc., 269 NLRB No. 8 (1984) the following comments of Judge Posner are apt:

> "The Board is allowed to reverse course, but it has got to give reasons or else the reversal is arbitrary." Continental Web Press v. NLRB, F.2d , (Case Nos. 83-2124, 83-2422) (7th Cir. 1984) (Daily Labor Report 9-10-84).

The above-quoted language of the NLRB is equally applicable to the time preceding the so-called critical period in the Carter-Glogau election. The egregious Union misconduct, compelling the Regional Director to seek Section 10(j) relief, created the fear and anxiety discussed by the NLRB in YKK (U.S.A.) Inc., supra. precluding and foreclosing the holding of a fair election; yet the Board did not even consider its coercive impact on the election. It is noteworthy that the NLRB expressly mentioned in YKK (U.S.A.) Inc., supra. that the NLRB does not treat "lightly such threats of bodily harm even when made to one employee, see Steak House Meat Co., 206 NLRB 28 (1973)." Of course, by sharp contrast, the threats of bodily harm to non-striking employees of Carter-

Glogau during the pre-petition period were made by Union agents to numerous employees, as the NLRB decision in Construction, Production and Maintenance Laborers Local 383, supra. documents.

Similarly, the Ninth Circuit itself in NLRB v. Dakin and Company, 477 F.2d 492 (9th Cir. 1973) described the proposition that pre-petition misconduct be excluded from the inquiry as to whether "laboratory conditions" requisite for NLRB elections were disturbed as merely an "evidentiary device" See too NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359 (9th Cir. 1981) cert. den. 454 U.S. 835 (1981).

Also, the Tenth Circuit in NLRB v. Lawrence Typographical Union, 376 F.2d 643 (10th Cir. 1967) found that the unfair labor practice activity committed there during the pre-petition period did not dissipate over a relatively short period of time but rather carried over into the post-petition period. The same rationale and logic applies to the wide array

of unfair labor practices committed by the Union in this case. Additionally, in Catholic Medical Center of Brooklyn and Queens, Inc., 589 F.2d 1166 (2nd Cir. 1978), the Second Circuit found it was a reversible error and arbitrary and capricious for the NLRB to apply its pre-petition exclusionary rule to the facts of that matter. Review of the facts of Catholic Medical Center of Brooklyn and Queens, Inc., supra. with the instant case demonstrates conclusively that the unfair labor practice activity found by the NLRB to have been committed by the Union herein was far more egregious and flagrant than the activity complained of in Catholic Medical Center, supra. In short, the Ninth, Tenth, and Second Circuit Courts of Appeals have been uniform in considering the NLRB pre-petition exclusionary rule, when it has been applied, as simply an "evidentiary device" not a hidebound principle unthinkingly applied irrespective of the facts under review.

Also, by analogy, appellate courts have enforced NLRB bargaining orders even though the unfair labor practice activity was committed literally years ago. For example, in NLRB v. L.B. Foster Corp., 418 F.2d 1 (9th Cir. 1979) an election was held in December, 1976. The NLRB order was rendered in November, 1977, and enforced by the court in late 1979. See also, cases cited therein where bargaining orders were enforced even though the unlawful conduct occurred over three years prior. See too NLRB v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1967) (bargaining order enforced though five years had elapsed since the unlawful conduct). The Ninth Circuit, among others, obviously believes that the lingering effects of unfair labor practices warrant the extreme remedy of a bargaining order rather than the traditional Board remedy of a rerun election, notwithstanding the passage of literally years. The NLRB itself has imposed bargaining orders on employers

found in violation of various provisions of the Act despite the passage of many years even where the Union had never attained a majority status.

For example, in Conair Corp., 261 NLRB 1189 (1982) enf. den. in rel. part Conair v. NLRB 721 F.2d 1355 (D.C. Cir. 1983) the Board imposed a bargaining order even though the Union had never attained majority status and the unlawful conduct of the employer occurred over five years prior. The Board focused on: ". . . the lingering effects of respondent's massive unrelenting course of conduct." In the same way, the Union here engaged in a "massive unrelenting course of conduct"; there were twenty-six incidents of serious misconduct constituting unfair labor practices.

Conair, supra., also spoke of a "multiplier effect" created by repetition and timing. Here, the Union repeatedly and egregiously violated the National Labor Relations Act (29 U.S.C. §151 et. seq.) on the virtual eve

of filing of the petition with only federal court injunctive relief halting this unremitting pattern of union coercion and intimidation.2/

2/ Indeed, the wave of Union unfair labor practice conduct was only halted by the issuance of an injunction by a federal district court, which,in turn,was affirmed by the Ninth Circuit (See App.103a, 109a) This injunctive relief was sought and obtained by the Regional Director of the National labor Relations Board invoking Section 10(j) of the National Labor Relations Act (29 U.S.C.§160(j)) in order to restrain the Union's flagrant unlawful conduct fully described in Construction, Production and Maintenance Laborers Local 383, supra. It should be underscored that Section 10(j) relief is very extraordinary. For example, in 1979, the Board only invoked Section 10(j) in sixty-seven instances. "Remedies for Discriminatory Discharges", 5 Industrial Relations Law Journal 564, 581 (1983) Also, in fiscal year 1982, the Board granted authority to the Regional Director to seek this type of injunctive relief in fifty-four cases compared to seventy-two authorizations in fiscal year 1981. Labor Relations Handbook, 1982 (B.N.A. 1983) at p. 198. Illustrative is Minnesota Mining and Manufacturing Co. v. Meter, 385 F.2d 265 (8th Cir. 1967), where the court stated:

> "Section 10(j) is reserved for more serious and extraordinary set of circumstances where the unfair labor practices, unless conta ned, would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels."

It is ironic that the very Union misconduct which prompted the Regional Director to seek and obtain a Section 10(j) (29 U.S.C. §160(j)) injunction from the Federal District Court was paradoxically shunned in his later determination concerning whether the election should be set aside.

Also, in United Dairy Farmers Cooperative Association, 257 NLRB 772 (1981) the NLRB issued a bargaining order compelling the employer to bargain with a Union which had never obtained majority status even though the unfair labor practices which the employer committed occurred nearly eight years prior. See also United Dairy Farmers Cooperative Association v. NLRB, 633 F.2d 1054 (3rd Cir. 1983) But see Gourmet Foods, 270 NLRB No. 113 (1984), where the NLRB reversed its course and indicated that its discretionary power to remedy unfair labor practices does not include issuance of "non majority" bargaining orders.

As been shown, the decision below is in conflict not only with NLRB precedent but with precedent existing in the Ninth, Tenth, and Second Circuit Courts of Appeals (But see NLRB v. Golden Age Beverage Company, 415 F.2d 26 (5th Cir. 1959)) (where the Fifth Court endorsed the NLRB pre-petition exclusionary

"rule"). Furthermore, as the Sixth Circuit has indicated: "common sense teaches that threats of physical violence do not subside in only two months". NLRB v. Mr. Porto, Inc., 590 F.2d 637, 639 (6th Cir. 1978) So too here, the effects of the broad based Union campaign of physical violence and terror did not simply disappear with the filing of a decertification petition; rather, this conduct retained its lingering effects as the Board itself has found in the bargaining order context. See e.g., Conair Corp., 261 NLRB 1189 (1984).

In sum, a welter of confusion and unpredictability exists in the law relative to the appropriate period for determining relevant evidence in NLRB election objections. Given the indisputable and incontrovertible fact that employee free choice is a transcendant value under the Act (29 U.S.C. §157, 159) the court should take this opportunity to redefine the standard in terms of relevancy of the proof, not an arbitrary, capriciously

applied cut-off date and hence safeguard the integrity of the NLRB electoral process. In Hickman Harbor Service v. NLRB, F.2d , (Case No. 83-5161, 83-5327) (6th Cir. 1984) (Daily Labor Report, 7-27-84) the court stated that the "laboratory climate surrounding representative elections will not always be optimum, and every election slightly tainted by misconduct cannot always be set aside, nevertheless, where the record reveals an environment markedly tainted with coercive behavior, a new election must be held" (emphasis added) See NLRB v. Skelly Oil Co., 473 F.2d 1079, 1085 (8th Cir. 1973) Zieglers Refuse Collectors, Inc., 639 F.2d at 1004 (3rd Cir. 1981). Relevancy should be the hallmark of the inquiry and if the electoral environment is "markedly tainted with coercive behavior", as shown here by the relevant proof, a new election must be held.

The NLRB and the Ninth Circuit have disregarded their own precedent in certifying

the Union below notwithstanding the tainted electoral atmosphere created by the coercive impact of the numerous Union unfair labor practices.

This Court has repeatedly made clear, "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . ." American Shipbuilding Co. v. NLRB, 380 US 300, 318 (1965). Also, the courts "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute" NLRB v. Brown, 380 US 278, 291(1965). Congressional policy underlying the National Labor Relations Act, as amended (29 U.S.C. §159) would be impaired and frustrated to the extent that employee free choice is defeated by unfair labor practice activity which permeates the electoral atmosphere precluding the expression of employee choice as envisioned by the

Act and contemplated by the Board's self-created standard of "laboratory conditions."

Conclusion

For the reasons stated above, this petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 20 day of September, 1984.

SNELL & WILMER

By _____

Gerard Morales
Counsel of Record
Thomas J. Kennedy
3100 Valley Bank Center
(602) 275-7388
Phoenix, Arizona 85073
Attorneys for Petitioner

APPENDIX

APPENDIX A

RECEIVED
MAR 16 1984
SNELL & WILMER

FILED
MAR 14 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	Nos. 83-7092/7124
Petitioner,	)	
vs.	)	MEMORANDUM*
CARTER-GLOGAU LABORATORIES, INC.,	)	
Respondent.	)	

Petition for Enforcement of an Order of the National Labor Relations Board

Argued and submitted January 12, 1984

Before: ANDERSON, SKOPIL, and FERGUSON, Circuit Judges

The National Labor Relations Board ("Board") petitions for enforcement of its order, 265 NLRB No. 17 (1982), directing

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* Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

Carter-Glogau ("Company") to bargain collectively with Construction, Production, and Maintenance Laborers Local No. 383 ("Union"). We enforce the order.

The Company contests the eligibility of 19 striking employees to vote in a decertification election. Striking workers "are presumed to retain an interest in their jobs." NLRB v. Neuro Affiliates Co., 702 F.2d 184, 185 (9th Cir. 1983). This presumption is not rebutted if they find new jobs at a higher salary. Therefore, the striking employees here retained their right to vote in the decertification election. The Board's finding that the strikers intended to return to the Company was supported by substantial evidence on the record.

The Board concluded that the Union's misrepresentations before the election were not grounds for overturning the results under Hollywood Ceramics Co., Inc., 140 NLRB 221, 224 (1962). Shortly before deciding the

present case, the Hollywood test was overruled by Midland National Life Insurance Co., 263 NLRB 127 (1982). In Midland, the Board held that it will intervene only where "a party has used forged documents which render the voters unable to recognize propaganda for what it is." Id. at 133. The Midland standard is to be applied "to all pending cases in whatever stage." Id. at 133 n.24. Cf. NLRB v. Milwaukee Brush Mfg. Co., 705 F.2d 257, 258 (7th Cir. 1983)(Midland standard applied retroactively).

The Board reached the correct result under the wrong test. The Company does not contend that the Union used forged documents. Because the Midland standard for overturning elections is more stringent than the Hollywood test applied by the Board, it would be futile to remand for application of the Midland test. See NLRB v. Yellow Transportation Co., 709 F. 2d 1342, 1343 (9th Cir. 1983).

The Board's finding that the alleged pre-petition misconduct of the Union provided an insufficient basis for overturning the election is supported by evidence on the record. The conduct was "too remote (to the election) to have prevented the employees' exercise of free choice." NLRB v. Golden Age Beverage Co., 415 F.2d 26, 31 (5th Cir. 1969).

The Company wrongfully refused to bargain with the Union following the election. After certification a union enjoys an irrebuttable presumption of majority status, usually for one year, absent "unusual circumstances." NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979). The Company's belief that reinstated strikers do not support the Union is not an unusual circumstance. See also Inter-Polymer Industries, Inc. v. NLRB, 480 F.2d 631, 633 (9th Cir. 1973); Brooks v. NLRB, 348 U.S. 96, 103-04 (1954).

The Board's adoption of the Regional Director's rationale sufficiently provided for judicial review and did not deny the Company due process. The Board "may articulate the basis of its order by reference to other decisions ...." NLRB v. Metropolitan Insurance Co., 380 U.S. 438, 443 n.6 (1965). Similarly, the Board did not deny the Company due process in denying the Company's motions for reconsideration. The Board sufficiently informed the Company of its disposition and reasons. American President Lines, Ltd. v. NLRB, 340 F.2d 490, 492 (9th Cir. 1965).

The Board will be ENFORCED.

APPENDIX B

265 NLRB No. 17

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARTER-GLOGAU LABORATORIES, INC.

and

Case 28-CA-6912

CONSTRUCTION, PRODUCTION & MAINTENANCE LABORERS' LOCAL UNION 383, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL--CIO

DECISION AND ORDER

Upon a charge filed on May 3, 1982, by Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL--CIO, herein called the Union, and duly served on Carter-Glogau Laboratories, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on May 13, 1982, against Respondent, alleging that Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge

and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 9, 1982, following a Board election in Case 28--RD-379, the Union was duly certified as the exclusive collective--bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 28, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representa-

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[1] Official notice is taken of the record in the representation proceeding, Case 28--RD--379, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

tive, although the Union has requested and is requesting it to do so. On June 4, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 30, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 9, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgement should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and brief in opposition to the General Counsel's Motion for Summary Judgment, Respondent, in substance, attacks the validity of the certification based on its objections to the election and on its assertion that the ballots of certain economic strikers should not have been counted, contends that its refusal to bargain was based on a good-faith doubt of the Union's majority status, and further argues that the Board's failure to explicate its reasons for denying its request for review of the Regional Director's Supplemental Report, and its motions for reconsideration, amounted to a denial of due process.

A review of the record herein, including the record in Case 28--RD--379, reveals that pursuant to a Decision and Direction of Election, an election was conducted on July 1, 1981, which resulted in a 65-to-55 vote against the Union, with 28 determinative challenged ballots remaining.[2] The Employer and the Union timely filed objections to the election. In

its objections, the Employer argued that the Union made certain material misrepresentations which affected the outcome of the election. The Union, on the other hand, asserted in its objections that the striking employees, unlike the nonstriking employees, were required to vote under unfavorable conditions and further alleged that a supervisor had been present at the polls during the election. A hearing on the challenged ballots and objections to the election was conducted between July 27 and 30, 1981, issued his report recommending that all objections and challenges to ballots be overruled, that the 28 ballots be opened and counted, and that the appropriate certification be issued. The Employer and the Union thereafter filed exceptions to the Hearing Officer's report.

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[2] The Employer challenged the ballots of 24 voters on the grounds that they had abandoned their employment status by obtaining employment elsewhere. It subsequently withdrew the challenge to one of these ballots. The Union challenged the ballots of four voters on the ground that they had boted at an incorrect polling place.

On September 18, 1981, the Regional Director issued a Supplemental Decision and Order on Determinative Challenged Ballots and Objections to Conduct Affecting the Results of the Election in which he adopted the Hearing Officer's recommendation that all objections be overruled and that the Union's challenges to ballots also be overruled. With respect to the Employer's challenges to ballots, the Regional Director sustained the challenges to four ballots[3] and overruled the remainder, noting that on a date to be determined by him all challenged ballots that had been overruled would be opened and counted and that a proper certification would then be issued. Thereafter, the Employer and the Union filed requests for review of the Regional Director's Supplemental Decision and Order. By telegraphic order dated March 4, 1982, the Board, while finding that a substantial issue had been raised concerning the ballots of employees Pierce, Wilshusen, Brink, and LaMarche, denied, in all other

respects, the Employer's and the Union's requests for review. However, noting that the opening and counting of the ballots whose challenges had been overruled might make the ballots of the above-named individuals non-determinative, the Board found it unnecessary to rule on their eligibility to vote until such time as a revised tally of ballots showed them to be determinative.[4] On April 1, 1982, a revised talley of ballots was issued revealing that of the 148 ballots case, 77 were cast for, and 67 against, the Union, with the 4 challenged ballots remaining nondeterminative. The Union was thereafter certified on April 9, 1982, as the exclusive collective-bargaining representative of all employees in an appropriate unit.[5]

In relying on the objectives raised in the underlying representation proceeding and by questioning the voter eligibility of certain strikers, Respondent in the instant case is seeking to relitigate matters that have previously been considered and rejected by the

Board. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

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[3] The ballots included those of employees Marvin Pierce, Rolene Wilshusen, Deborah Brink, and Frederick LaMarche.

[4] On March 4, 1982, the Employer filed with the Board a motion for reconsideration of its order denying the Employer's request for review. The Board, on March 29, 1982, denied the Employer's motion as lacking in merit. On March 19, 1982, the Employer renewed its motion for reconsideration which the Board similarly denied on April 13, 1982, since it raised nothing not previously considered.

[5] The appropriate unit consists of "All production and maintenance employees employed by the Employer at its facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; but excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act."

[6] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Except for its contention that the Union lacks majority status and its claim that it was denied due process by the Board, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which could require the Board to reexamine the decision made in the underlying representation proceeding.

Further, we find without merit Respondent's contention that its refusal to bargain with the Union, occurring less than 3 weeks after it was certified by the Board, was based on a change in the employee complement as of that time. The Board, with Supreme Court approval, has long held that, absent unusual circumstances, a union's continued majority status is irrebuttably and conclusively presumed to exist for 1 year following certification.[7] Other than the

unsupported claim in its answer that the Union did not then represent a majority of the employees in the unit,[8] Respondent has presented no unusual circumstances which justified its refusal to bargain with the Union during its certification year. Accordingly, we find that its refusal to bargain was unlawful.

We also find without merit Respondent's contention that it was denied due process by the Board's failure to explicate its reason for denying Respondent's request for review in the underlying representation proceeding. In denying the requests for review, the Board adopted as its own the rationale set forth by the Regional Director in his Supplemental Decision and Order, which it found adequate. The Board has held that no greater articulation of its rationale is required of it.[9]

In view of the foregoing, we find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

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[7] Lee Office Equipment, 226 NLRB 826, 831 (1976), Ray Brooks v. N.L.R.B., 348 U.S. 96 (1954); see also, Lexington Cartage Company, Inc., 259 NLRB No. 5 (1981).

[8] Respondent's claim, purportedly supported by an affidavit from its personnel manager, that the striker replacements and newly hired employees comprise a majority of the bargaining unit and that the strikers who supported the Union are a minority, is insufficient to establish that the Union lacked minority support and does not constitute "unusual circumstances" warranting its refusal to bargain during the certification year.

[9] Middlesex Cablevision, Inc., 229 NLRB 1038, 1039 (1977).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, an Ohio corporation with its principal office and place of business located in Glendale, Arizona, is engaged in the business of manufacturing and packaging injectable medications. During the past 12 months, a representative period, Respondent has purchased and caused to be shipped to its Glendale, Arizona, facility goods and materials valued in excess of $50,000 from points and places located outside the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Construction, Production & Maintenance

Laborers' Local Union 383, Laborers' International Union of North America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> 11 production and maintenance employees of the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On July 1, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28, designated the Union as their representative for the purpose of collective

bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 9, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about April 19, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 28, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 28, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of

the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section 1, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practies within the meaning of Section 9(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the

appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period privided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Carter-Glogau Laboratories, Inc., is

an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5208 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 9, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within

the meaning of Section 9(a) of the Act.

5. By refusing on or about April 28, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondnet in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National

Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Carter-Glogau Laboratories, Inc., Glendale, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5208 West Missouri Avenue, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Glendale, Arizona, facilities copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent

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[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in comspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure taht said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for REgion 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. October 15, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CARTER-GLOBAU LABORATORIES, INC.

Employer

and

DANIEL R. GOOLD, an Individual Case 28-RD-379

Petitioner

and

LABORERS' DISTRICT COUNCIL OF THE
STATE OF ARIZONA AND CONSTRUCTION,
PRODUCTION AND MAINTENANCE
LABORERS' UNION, LOCAL 383,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Union

SUPPLEMENTAL DECISION AND ORDER ON DETERMINATION
CHALLENGED BALLOTS AND OBJECTIONS TO
CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Pursuant to a Decision and Direction of Election issued by the undersigned on June 2, 1981, 1/ an election by secret ballot was conducted on July 1, by agents of the National Labor Relations Board among the employees in the unit found appropriate by the under-

1/ All dates herein are for 1981, unless otherwise noted.

signed. 2/ The tally of ballots which was served on all parties showed the following results:

Approximate number of eligible voters	167
Void ballots	0
Votes cast for the Union	55
Votes cast against participating labor organization	65
Valid votes counted	120
Challenged ballots	28
Valid votes counted plus challenged ballots	148

Challenges are sufficient in number to affect the results of the election.

Objections to conduct affecting the results of the election were timely filed by the Union on July 8, and by the Employer on

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2/ All production and maintenance employees at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri, Glendale, Arizona, excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

July 9, with copies being served on all parties.

THE UNION'S OBJECTIONS

1. On July 1, 1981, the Employer insisted upon, and the Board acquiesced in, a system of votir which provided incumbent employees the right to vote in an air-conditioned conference room while striking employees were required to vote at an outdoor location in 100° plus temperatures and during a dust storm. This voting system adversely affected the laboratory conditions necessary for a fair and regular election because those persons most likely to vote to decertify the Union were provided with a comfortable location at which to cast their ballots while striking employees, more likely to vote to retain the Union, were required to vote in an extremely undesirable location.

2. Laboratory conditions necessary for a fair and regular election were destroyed because incumbent employees were given two voting times and a total of three and one-half hours in which to cast their ballots, while striking employees were given a single voting time of

two and one-half hours.

3. On election day, July 1, 1981, at approximately 7:15 a.m., during voting hours, Al Perez, a company supervisor, entered the area in which employees were voting, thereby destroying the laboratory conditions necessary for a fair and regular election.

THE EMPLOYER'S OBJECTIONS

Specifically, the Union sent a letter containing numerous misrepresentations, signed by its Business Manager, William Soltero, to the eligible voters. The letter was not received by employees until the evening of June 30, 1981, and, therefore, the Employer was prevented from responding to said misrepresentations. The letter misrepresented inter alia.

(a) That the Petition herein had been filed by the Employer's management;

(b) That the petititon was an attempt by the Employer to remove the Union;

(c) The benefits and terms of employment which the employees had enjoyed before the strike;

(d) The benefits and terms of employment which the employees are presently enjoying;

(e) The Employer's position and proposals during bargaining;

(f) That management in general and some of the supervisors in particular mistreated the employees, had no respect for them and were tyrants and liars;

(g) That the Employer had no concern for the employees' families, health, home, well-being and dignity;

(h) That the Employer had broken past promises;

(i) That without the Union the Employer would reduce the employees' wages to the 1972 minimum wage level.

Union representatives misrepresented to striking employees that the purpose of the election was to determine whether they would collect backpay from the Employer and that a yes vote meant that they would collect backpay.

By these and other acts and conduct, the Union through its agents engaged in improper and illegal conduct that affected the results of the election.

THE CHALLENGES

The Union challenged the ballots cast by Paul Owens, Doris Kiser, Faye Phillips, and Irmgard Cruz on the basis that they voted at an incorrect polling place.

The Employer challenged the Ballots cast by Romaine Andries, Velia Rodriguez, Graciela Garcia, Juanita Garcia, Brenda Bynum, 3/ Marvin Pierce, Shirley Davis, Linda Westlake, Dorothy Florey, Cheryl Moore, Frances Buehner,

3/ By letter dated July 10, the Employer requested the withdrawal of its challenge to the ballots of Brenda Bynum. On July 15, I approved the Employer's request.

Rolene Wilshusen, Arthur Mayve, Doloris Vereb, Deborah Brink, Frederick LaMarche, Romae Hellum, Karen Roark, Madalane McDonald, Ruby Villareal, William McCall, Barbara Strottman, Dahlila Marquez, and Leonard Shalongo on the ground that they had abandoned their status as employees by securing permanent employment elsewhere.

On July 15, I issued an Order Directing Hearing and Notice of Hearing in which it was ordered, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, that a hearing be held before a hearing officer for the purpose of resolving the issues raised by the objections and by the determinative challenged ballots. The order further required that the hearing officer designated for the purpose of conducting the hearing prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the undersigned as to

the disposition of the objections and of the determinative challenged ballots.

Pursuant to said Order, a hearing was held at Phoenix, Arizona, on July 27, 28, 29, and 30, before a duly designated Hearing Officer. During the hearing, all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to present oral arguments in support of their positions.

On August 20, the hearing officer issued his Report and Recommendations on Determinative Challenged Ballots and Objections to Conduct Affecting the Results of the Election. Upon consideration of the hearing officer's findings of fact, conclusion, and recommendations, the entire record in this proceeding, the exceptions and briefs filed by the Employer and the Union, and the Union's answering brief, I hereby adopt the recommendations of the hearing officer as modified herein.

The Union's Exceptions:

The Union filed exceptions to the

Hearing Officer's recommendation that its Objections Nos. 1 and 2 be overruled, and to the failure of the Hearing Officer to grant its motion to reopen the record for receipt of additional evidence. No exception was taken to the Hearing Officer's recommendation that the Union's Objection No. 3 be overruled, and I shall adopt his recommendation as to this Objection.

As to objection Nos. 1 and 2, the Union's exceptions raise no issue of fact or law not fully considered by the Hearing Officer and, for the reasons fully set forth in his Report, I shall adopt his recommendation that the Union's Objections Nos. 1 and 2 be overruled in their entirety.

As to the Union's exceptions to the Hearing Officer's refusal to grant its motion to reopen the record, I shall sustain his ruling, in that, for the reasons set forth in his report and herein, I have adopted his recommendation as to the disposition of the

Employer's Objections to which the Union's motion is directed.

The Employer's Exceptions:

The Employer filed general exceptions to the Hearing Officer's recommendation that its Objections be overruled, and to his recommendations that the ballots cast by employees whom the Employer challenged be overruled, and that their ballots be opened and counted.

The Employer's Objections concern a letter, attached to the Hearing Officer's Report as Exhibit 1, which the Employer alleges makes substantial misrepresentations and which was distributed at a time so close to the election as to foreclose a response by the Employer thereby affecting the results of the election. I shall, for the reasons set forth by the Hearing Officer and those set forth herein, adopt the Hearing Officer's recommendations that the Employer's Objections be overruled in their entirety.

As noted by the Employer in its brief, the Board does not attempt to gauge the actual

effect of alleged interference with an election, but attempts instead to establish whether or not it is reasonable to believe that the conduct tended to prevent a free expression of choice. I find, as did the Hearing Officer, that the Union's letter when read in its entirety, constitutes permissible election campaign rhetoric. 4/ I shall for all of these reasons, and those set forth by the Hearing Officer, overrule the Employer's Objections. 5/

The Challenged Ballots:

No exceptions were filed as to the Hearing Officer's recommendation that the Union's

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4/ Georgia-Pacific Corporation, 199 NLRB 240.

5/ While the Employer requests that the undersigned take administrative notice of a pending unfair labor practice proceeding, Case 28-CB-1710, in which it has been alleged that the Union herein has engaged in certain strike misconduct at the Employer's premises, it should be noted that all the unlawful conduct alleged therein occurred prior to the filing of the petition herein, and several months prior to the date of the election. Accordingly, such alleged conduct could not and did not interfere with the conduct of the election herein.

challenges to the ballots cast by Irmgard Cruz, Doris Kiser, Paul Owens, and Faye Phillips be overruled. For the reasons stated by the Hearing Officer and, in the absence of any exceptions, I will adopt his recommendations as to the disposition of these challenged ballots.

The Employer excepted to the Hearing Officer's recommendations concerning the disposition of the challenged ballots cast by Romaine Andries, Velia Rodriguez, Graciela Garcia, Juanita Garcia, Marvin Pierce, Shirley Davis, Linda Westlake, Dorothy Florey, Cheryl Moore, Frances Buehner, Rolene Wilshusen, Arthur Mayve, Doloris Vereb, Deborah Brink, Frederick LaMarche, Romae Hellum, Karen Roark, Madalane McDonald, Rudy Villareal, William McCall, Barbara Strottman, Dahlia Marquez, and Leonard Shalongo.

For the reasons stated in his Report and Recommendations, I shall adopt the Hearing Officer's recommendation that the challenges to the ballots cast by Romaine Andries, Velia

Rodriguez, 6/ Graciela Garcia, Juanita Garcia, Shirley Davis, Linda Westlake, Dorothy Florey, Cheryl Moore, Frances Buehner, Arthur Mayve, Doloris Vereb, Romae Hellum, Karen Roark, Madalane McDonald, Rudy Villareal, William McCall, Barbara Strottman, Dahlia Marquez, and Leonard Shalongo be overruled.

As stated by the Hearing Officer in his Report, the tests to be applied in determining the eligibility of economic strikers are set forth by the Board in Pacific Tile and Porcelain Company, 137 NLRB 1358 (1962), and in the

6/ In an addendum to Brief filed by the Employer on September 9, the Employer contends that Rodriguez has abandoned the strike by moving out-of-town. The Board's decision in Akron Engraving Company, Inc., 170 NLRB 132 (1968) is cited in support of this contention. Therein, the Board found that employees who had obtained permanent employment in another city and had sold, or were selling, their homes were ineligible voters. Herein, however, there is evidence only that Rodriguez at some unknown time moved to another location, approximately 30 miles from the Employer's place of business. There is no objective evidence that she has obtained permanent employment elsewhere. I find that the fact that Rodriguez has changed her residence is insufficient to overcome the presumption of her eligibility to vote.

other cases cited by the Hearing Officer. Thus, an economic striker is presumed to be eligible to vote in an election held within 12 months of the commencement of an economic strike, absent objective evidence that the striker has abandoned the strike, or has obtained permanent employment elsewhere. Employees who tell prospective employers that they are seeking permanent employment, or so indicate on employment applications, or tell such prospective employers during the course of a job interview that they do not wish to return to the struck employer, are not deemed to have abandoned the strike, or their former position of employment. Q-T Tool Company, Inc., 199 NLRB 500. This is especially the case if such pre-election statements are made in the course of an employment interview with a prospective employer having stated policy of not hiring temporary employees. Q-T Tool, supra.

Accordingly, contrary to the Employer's arguments set forth in its Exceptions and Brief

in support thereof to the Hearing Officer's Report, this is not a case where the Hearing Officer has made improper credibility determinations or assessments of witness testimony, since no credibility resolutions are involved in the Board's policy of discounting the above described employment interview and pre-election statements as not being probative to the requisite determination, based upon objective not subjective facts, as to whether an employee, using the date of the election, had evidenced an intent to abandon the former employment relationship. Q-T Tool, supra, and cases cited therein.

Nate Ben's Reliable, Inc., 219 NLRB 818, cited by the Employer in it's brief is distinquishable in that, there, the strikers found ineligible had testified that they would not return to the struck employer absent a strike settlement that resulted in their obtaining wages equal to those paid by their new employer. There is no such evidence in the instant case. Rather, the employee statements herein that

they would not return to Carter-Glogau until there was a strike settlement are more akin to employee statements conditioning return to their former jobs on their being a union contract, which qualification the Board has held does not evidence an intent to abandon their former employment. Akron Engraving, supra. The other two cases relied upon by the Employer, National Gypsum Company, 133 NLRB 1492 (1961), and Helen Rose Co., 127 NLRB 1682 (1960), were both decided prior to the Board's decision in Pacific Procelain, supra, and the Board, at footnote 1 of the latter decision, states that its decision in National Gypsum was one of the decisions Pacific Porcelain was intended to clarify. Likewise, the Board specifically overruled prior decisions, such as Helen Rose, which were inconsistent with its decision in Pacific Porcelain. I find, therefore, that the Employer's reliance upon National Gypsum and Helen Rose is misplaced. For the reasons set forth above, as well as those fully set forth by the Hearing Officer, I shall overrule

the challenges to the ballots cast by these 19 strikers. 7/

However, I find merit in the Employer's exceptions to the Hearing Officer's recommendations that the Employer's challenges to the ballots cast by Marvin Pierce, Rolene Wilshusen, Deborah Brink and Frederick LaMarche be overruled. On the day of the election, all four individuals were permanently employed elsewhere. There is no evidence that any of them actively supported the strike, or ever indicated any intention of returning to the Employer. None testified at the hearing.

James Schwake, General Manager of Casserole of Arizona, Inc., where both Pierce and Wilshusen are employed, testified that both were hired as permanent employees, both are earning a higher wage than they would have at the Employer, and that both told him on dates

7/ As noted by the Hearing Officer, I have previously approved the Employer's withdrawal of its challenge to the ballot of Brenda Bynum.

subsequent to their employment interview that they did not intend to return to the Employer. There was, in fact, unrebutted testimony by Schwake that Wilshusen had complained to him just prior to the election that she saw no need to go in and vote since she no longer considered herself an employee of Carter-Glocau.

Peter Joachin, Labor Relation's Supervisor for Arizona Public Service Company, where Brink is employed, testified that Brink is permanently employed and that she told him sometime after the election, approximately five months after her hire, that she would not return to her former Employer.

Barbara Hanson, the Employer's Personnel Manager, testified that she had offered LaMarche, who was on the Employer's preferential rehire list, employment on three separate occasions with LaMarche declining each offer, although, on each occasion LaMarche was offered a job other than his former position, the record does not disclose whether the offered positions were or were not in substantially equivalent

positions. In any event, there is uncontradicted testimony that in Hanson's last conversation with LaMarche he told her he did not wish to be contacted anymore and was not interested in returning to work.

The testimony set forth above has effectively rebutted any presumption that either Pierce, Wilshusen, Brink, or LaMarche retained their eligibility to vote in the election. I shall, therefore, contrary to the Hearing Officer's recommendations, sustain the challenges to their ballots.

ORDER

On the basis of the foregoing, the entire record in this matter, the Hearing Officer's Report and Recommendations, the exceptions and briefs filed by the Employer, and the Union,

IT IS HEREBY ORDERED that the Union's Objections Nos. 1, 2, and 3 be, and they hereby are, overruled in their entirety, and,

IT IS HEREBY ORDERED that the Employer's Objections be, and they hereby are, overruled in their entirety, and,

IT IS HEREBY ORDERED that the challenges to the ballots cast by Brenda Bynum, Romaine Andries, Velia Rodriguez, Graciela Garcia, Juanita Garcia, Shirley Davis, Linda Westlake, Dorothy Florey, Cheryl Moore, Frances Buehner, Arthur Mayve, Doloris Vereb, Romae Hellum, Karen Roarke, Madalane McDonald, Rudy Villareal, William McCall, Barbara Strottman, Dahlia Marquez, Leonard Shalongo, Paul Owens, Doris Kiser, Faye Phillips, and Irmgard Cruz be, and they hereby are, overruled, that, on a date to be determined by the undersigned, their ballots be opened and counted and a Revised Tally of Ballots be issued, that, if the Revised Tally shows that the Union has obtained a majority of the valid votes counted a Certification of Representative be issued and, that if the Revised Tally shows that a majority of the valid votes counted has not been cast for the Union, a Certification of Results issue and,

IT IS HEREBY ORDERED that, the challenges to the ballots cast by Marvin Pierce, Rolene

Wilshusen, Deborah Brink, and Frederick LaMarche be, and they hereby are, sustained, and that their ballots shall remain unopened and uncounted.

Dated at Phoenix, Arizona this 18th day of September, 1981.

/s/ Milo V. Price
Milo V. Price, Regional Director 8/
Region 28

8/ Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision must be filed with the Board in Washington, DC. Pursuant to Section 102.69(g), affidavits and other documents which a party submitted timely to the Regional Director in support of objections are not part of the record unless included in the Regional Director's Decision or appended to the request for review or opposition thereto which a party submits to the Board. The request for review must be received by the Board in Washington by October 1, 1981.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CARTER-GLOGAU LABORATORIES, INC.

Employer

and Case 28-RD-379

DANIEL R. GOOLD, An Individual

Petitioner

and

LABORERS' DISTRICT COUNCIL OF THE STATE OF ARIZONA AND CONSTRUCTION, PRODUCTION AND MAINTENANCE LABORERS' UNION, LOCAL 383, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Union

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON DETERMINATIVE CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Pursuant to a Decision and Direction of Election issued by the Regional Director for

Region 28 on June 2, 1981,1/ an election by secret ballot was conducted on July 1 by agents of the National Labor Relations Board among employees in the unit found appropriate by the Regional Director. 2/ The tally of ballots served on all parties at the conclusion of the balloting showed the following:

Approximate number of eligible voters	167
Void ballots	0
Votes cast for the Union	55
Votes cast against participating labor organization	65
Valid votes counted	120
Challenged ballots	28
Valid votes counted plus challenged ballots	148

Challenges are sufficient in number to affect the results of the election.

Objections to conduct affecting the results of the election were timely filed by the Union

1/ All dates herein are 1981 unless otherwise stated.

2/ All production and maintenance employees at the Employer's facilities located at 5160 West Bethany Home Road, Glendale, Arizona, and 5308 West Missouri, Glendale, Arizona; excluding quality control employees, compounding room employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

on July 8 and by the Employer on July 9 with copies being served on all parties.

THE UNION'S OBJECTIONS

1. On July 1, 1981, the Employer insisted upon, and the Board acquiesced in, a system of voting which provided incumbent employees the right to vote in an air-conditioned conference room while striking employees were required to vote at an outdoor location in 100° plus temperatures and during a dust storm. This voting system adversely affected the laboratory conditions necessary for a fair and regular election because those persons most likely to vote to decertify the Union were provided with a comfortable location at which to cast their ballots while striking employees, more likely to vote to retain the Union, were required to vote in an extremely undesirable location.

2. Laboratory conditions necessary for a fair and regular election were destroyed because incumbent employees were given two voting times and a total of three and one-half hours in which to cast their ballots, while striking employees were given a single voting time of two and one-half hours.

3. On election day, July 1, 1981, at approximately 7:15 a.m., during voting hours, Al Perez, a company supervisor, entered the area in which employees were voting, thereby destroying the laboratory conditions necessary for a fair and regular election.

THE EMPLOYER'S OBJECTIONS

Specifically, the Union sent a letter containing numerous misrepresentations, signed by its Business Manager, William Soltero, to the eligible voters. The letter was not received by employees until the evening of June 30, 1981, and, therefore, the Employer was

prevented from responding to said misrepresentations. The letter misrepresented inter alia:

(a) That the Petition herein had been filed by the Employer's management;

(b) That the Petition was an attempt by the Employer to remove the Union;

(c) The benefits and terms of employment which the employees had enjoyed before the strike;

(d) The benefits and terms of employment which the employees are presently enjoying;

(e) The Employer's position and proposals during bargaining;

(f) That management in general and some of the supervisors in particular mistreated the employees, had no respect for them and were tyrants and liars;

(g) That the Employer had no concern for the employees' families, health, home, well-being and dignity;

(h) That the Employer had broken past promises;

(i) That without the Union the Employer would reduce the employees' wages to the 1972 minimum wage level.

Union representatives misrepresented to striking employees that the purpose of the election was to determine whether they would collect backpay from the Employer and that a yes vote meant that they would collect backpay.

By these and other acts and conduct, the Union through its agents engaged in improper and illegal conduct that affected the results of the election.

THE CHALLENGES

The Union challenged the ballots cast by Paul Owens, Doris Kiser, Faye Phillips, and Irmgard Cruz on the basis that they voted at an incorrect polling place.

The Employer challenged the ballots cast by Romaine Andries, Velia Rodriguez, Graciela Garcia, Juanita Garcia, Brenda Bynum, 3/ Marvin Pierce, Shirley Davis, Linda Westlake, Dorothy Florey, Cheryl Moore, Frances Buehner, Rolene Wilshusen, Arthur Mayve, Doloris Vereb, Deborah Brink, Frederick LaMarche, Romae Hellum, Karen Roark, Madalane McDonald,

3/ By letter dated July 10, the Employer requested the withdrawal of its challenge to the ballot of Brenda Bynum. On July 15, the Regional Director approved the Employer's request.

Rudy Villareal, William McCall, Barbara Strottman, Dahlila Marquez, and Leonard Shalongo on the basis that they had abandoned their employment status with the Employer by securing permanent employment elsewhere.

On July 15, the Regional Director issued an Order Directing Hearing and Notice of Hearing in which he ordered that a hearing be held before a hearing officer for the purpose of resolving the objections and the challenged ballots. The Order Directing Hearing further ordered that the hearing officer designated for the purpose of conducting the hearing prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Regional Director as to the disposition of objections and the challenged ballots.

Pursuant to said Order, a hearing was held at Phoenix, Arizona, on July 27, 28, 29, and 30, before the undersigned hearing officer.

During the hearing, all parties were afforded full opportunity to be heard, to examine and cross examine witnesses, to introduce evidence bearing on the issues, and to present oral arguments in support of their positions.

Based upon my review of the entire record, research of the law, and my observation of witnesses, I make the following findings of fact and recommendations to the Regional Director. 4/

4/ On August 18, Counsel for the Union filed a Motion to Reopen the Record in this proceeding with the Acting Regional Director for the purpose of introducing three additional exhibits. On August 19, the Acting Regional Director referred this motion to the undersigned hearing officer for a ruling. The undersigned has reviewed the proposed exhibits and finds that they have minimal significance to this proceeding. Accordingly, they are rejected and the Motion to Reopen the Record is denied.

BACKGROUND

The Union has represented the Employer's employees for about nine years. Prior to the expiration of the current collective-bargaining agreement on November 18, 1980, the Employer and the Union bargained over the terms of a new contract, but were unable to reach agreement. The Union began an economic strike on November 19, 1980, which is still in progress. On March 27, the decertification petition was filed and the election was held on July 1.

THE UNION'S OBJECTIONS

With respect to its first two objections, the Union contends that the voting locations and times provided for striking employees to vote constituted objectionable conduct. The Regional Office established that striking employees would vote from 4:30 p.m. to 7:00 p.m. at an outdoor location at the

Employer's premises while nonstriking employees would vote at indoor locations at other times at the Employer's plant.

Prior to the election, the Union had protested these voting arrangements to the Regional Office contending that it was unfair to require striking employees to vote at an outdoor location in the summer heat, while nonstriking employees voted inside the Employer's air conditioned premises.

The witnesses who testified with respect to Objections 1 and 2 indicated that at the outside polling place the temperature was high, there were gusts of wind and dust but no dust storm, some paper flew around, the voting was peaceful, and all those involved in the voting were able to follow the instructions of the Board Agents. No testimony was presented that there were any disruptions in the voting procedure. Although requested to do so by the undersigned hearing officer, counsel for the Union was unable to specify the names of any

striking employees who were unable to vote due to the voting time or outside voting location for striking employees.

On January 21, the Regional Director for Region 28 issued a complaint against the Union in Case 28-CB-1710 alleging that the Union had engaged in certain picket line misconduct at the Employer's premises. Moreover, it is reasonable to expect a certain degree of animosity between striking and nonstriking employees and it has been the practice of the Board to establish separate voting locations to avoid possible disruptions and altercations. Furthermore, the Union has neither made a contention nor presented any evidence that any striking employee was denied an opportunity to vote because of the voting times and location established for striking employees. Moreover, it is the Board's practice to leave the selection of the time and place of the election to the Regional Director's discretion and the Board grants the Regional Director

broad discretion in the conduction of elections. Jat Transportation Corp., et al, 131 NLRB 122 (1961) and Manchester Knitted Fashions, Inc., 108 NLRB 1366 (1954). Therefore, I recommend that Union objections 1 and 2 be overruled in their entirety.

In regard to the Union's third objection, it is undisputed that a few minutes after 7 a.m. on the day of the election, at a time when the polls were open, Eliseo Perez, the Employer's packaging department manager whom the parties stipulated is a supervisor, entered the conference room where the election was being conducted. Perez entered the polling area for the purpose of informing the Board Agent that her announcement over the public address system regarding the election could not be heard by some employees. The Board Agent told Perez to leave the polls and he immediately complied with her instructions. Perez was at the polls for only a moment and did not speak to any employees.

Perez did not speak to any employees at the polls nor did he engage in any electioneering. It appears that Perez believed he had a legitimate reason for entering the polling area in that he was attempting to facilitate the conduct of the election. Moreover, Perez immediately complied with the instructions of the Board Agent to leave the polls. The Board has held that the momentary presence of a supervisor at the polls does not constitute objectionable conduct and an isolated breach of the rules governing the conduct of an election, in itself, does not warrant setting aside the election. El Rancho Market, 235 NLRB 468 (1978); Marathon Metallic Building Company, 224 NLRB 121 (1976); Murray Ohio Manufacturing Company, 156 NLRB 840 (1966); Dumont Electric Corporation, 97 NLRB 94 (1951). In view of the foregoing, I recommend that Union Objection 3 be overruled.

THE EMPLOYER'S OBJECTIONS

The Employer contends that the Union engaged in objectionable conduct by mailing a letter to employees, a copy of which is attached hereto as exhibit 1, which allegedly contains material misrepresentations made at a time the Employer did not have an opportunity to reply. In addition, the Employer asserts that the Union misrepresented to striking employees that the purpose of the election was to determine whether they would collect backpay from the Employer and that a "yes" vote meant that they would collect backpay.

Exhibit 1 is dated June 27, the postmark on envelopes in which it was received is June 29, and several employees testified that they received the letter in the mail a day or two before the election. Barbara Hanson, the Employer's personnel manager, testified without contradiction that the Employer did not

become aware of exhibit 1 until the evening of election day.

While the petition in this case was filed by Daniel R. Goold, an employee of the Employer, exhibit 1 states that the petition was filed by the Employer. Fermin Martinez, the administrative assistant to the Union's business manager, explained this reference in exhibit 1. Martinez asserts that since all of the antiunion propaganda associated with the election campaign, which had come to the Union's attention, had emanated from the Employer, the Union concluded that the dispute was with the Employer rather than the employees. The Union introduced two documents from the Employer, addressed to employees, dated March 31, and June 17, respectively, which state that the petition was filed by employees. However, it is unclear whether these documents were also distributed to striking employees. A number of employees testified that the source of the petition would not and did not

have any effect on how they voted. Finally, the Union failed in its attempt to produce any evidence or testimony that the Employer had promoted or assisted in the filing of the petition.

In further support of this objection, the Employer presented witnesses who testified that the Employer did not refuse to provide employees with a good hospitalization plan; that the Employer did not refuse any proposal from the Union as to a pension plan and did agree to a union proposal regarding such a plan; that the Employer did not renege on any grievance or arbitration proposals; and that the Employer did not take away six days of sick leave. However, Employer witnesses admitted that the Employer requires mandatory overtime work if volunteers cannot be found; that the Employer's final contract offer provided that because of a new sick leave sell back provision, employees could only earn six days sick leave per year instead of

12 days; and that the Employer's final contract offer did not contain pension provisions.

Exhibit 1 states, "Today you are receiving the fruit of the union effort. Without the Union you will return to minimum wage where you were in 1972." Employer witnesses testified that the Employer never informed employees that if the Union lost the election, the Employer would reduce wages to the minimum wage level that existed in 1972. The Employer admits that in 1972, some employees were receiving the federal minimum wage. Union representative Martinez explained that these two sentences meant that wage gains above the minimum wage were a result of union efforts at the bargaining table. Martinez added that in 1972 when the Employer was organized, employees were receiving minimum wage and that the Union contends, without representation, employee wages would revert to the minimum wage.

In support of the second aspect of its objections, Patricia Ames, a personnel assistant of the Employer, testified that around June 23, she received a telephone call from Mark Delahunt, a striking employee. According to Ames, Delahunt asked her what time employees were supposed to vote for back wages, Ames replied that she did not know anything about voting for back wages and Delahunt asked when employees were supposed to vote. Ames asked if he was referring to the election and when Delahunt said yes, she informed him of the date and time. According to Ames, Delahunt did not inform her who had made reference to a vote for back wages. Delahunt was not called to testify.

Rudy Villareal, a striking employee, first testified that in April, Dorothy Florey, another striking employee and a shop steward at the Employer, told him that if the Union won the election, he would get some backpay.

Later Villareal testified, "Well she (Florey) told me that they (the Employer) were just keeping us out of work and everything and that we'd probably be getting backpay because, you know, they took us out of work." Villareal added that Florey told him the Union had a charge to try to get striking employees some backpay. Finally, Villareal asserts that about two days prior to the election, Florey told him that the Employer had filed the petition for the election and that if the Union won the election, then he would go back to work at the Employer. Florey testified that she never told Villareal or any other striking employees that a vote to retain the Union was a vote for backpay and denies telling him that the Employer filed the petition. Florey further asserted that Union officials never made any such remarks to her.

Apparently, in further support of the second aspect of its objections, Employer witnesses testified that the logo on the envelope mailed to employees which contained exhibit 1 states, "Save Your Check Stubs and Register to Vote Local 383." It appears that the Employer would have the undersigned hearing officer conclude that the logo is a subtle message to employees that a vote for the Union will result in backpay. According to Union representative Martinez, this is a standard logo which appears on all union envelopes and it means that all Union represented employees should save their check stubs and they should be good citizens by registering to vote in political elections. Martinez asserts that the logo is unrelated to this Employer, the strike, or the Board election.

In General Knit of California, Inc., 239 NLRB 619 (1978) the Board returned to the standards specified in Hollywood Ceramics

Company, Inc., 140 NLRB 221 (1962) with respect to the issue of alleged misrepresentations. In Hollywood Ceramics, the Board held that it would only set aside elections where there had been a misrepresentation which involved a substantial departure from the truth so that the misrepresentation could reasonably be expected to have a significant impact on the election. The Board noted that "election campaigns are often hotly contested and feelings frequently run high. At such times a party may, in its zeal, overstate its own virtues and the vices of the other without essentially impairing laboratory conditions." Furthermore, absolute precision of statement and complete honesty are not always attainable in an election campaign nor are they expected by employees. Finally, the Board held that elections should not be lightly set aside nor should they be set aside where the alleged misrepresentations are not likely to have had a real impact on

the election.

In the instant case, I conclude that nothing contained in exhibit 1 would warrant setting aside this election. I find that the document was distributed at a time the Employer did not have an opportunity to respond and that it was a misrepresentation to state that the petition was filed by the Employer. However, the Employer previously had informed at least the nonstriking employees on two occasions that the petition had been filed by employees. Moreover, I believe that the source of the petition is not a material misrepresentation; it would not be a significant issue to the employees whose only real concern is that an election is to be held; and that any misrepresentation concerning this issue cannot reasonably be expected to have any impact on the election.

The statement in exhibit 1 that, "without the Union you will return to minimum wage where you were in 1972" is only typical campaign

propaganda. The Union is merely contending that wage increases over the years have been the result of Union action at the bargaining table. No employee could reasonably be expected to interpret this statement to mean that if the Union lost the election, wages would revert to the 1972 minimum wage level since such action would be a drastic violation of well known federal minimum wage laws. I have carefully reviewed the remaining statements in exhibit 1 and find them to be typical campaign propaganda which do not constitute objectionable conduct.

With respect to the second aspect of the Employer's objections, there is only hearsay testimony that striking employee Delahunt was informed that the election was related to back wages. Furthermore, no testimony was presented that the Union was in any way involved with the apparent beliefs of Mr. Delahunt. While striking employee Villareal testified that Union shop steward Florey told

him that if the Union won the election he would receive backpay, Florey denied making this statement and asserted that the Union had never made any such remarks to her. Villareal had a pronounced tendency to answer "yes" to any question and I find that he is not a reliable witness with respect to this matter. Even assuming, arguendo, that Florey made the statements attributed to her by Villareal, such statements were made to only one of 148 voters which would certainly not warrant setting aside this election. Finally, I conclude that the logo on the envelopes was unrelated to the election and did not constitute any message to employees that a vote for the Union would result in backpay. In view of the foregoing, I recommend that the Employer's objections be overruled in their entirety.

It should be noted that both the Employer and the Union have stated for the record that they would withdraw their respective objections if the final resolution of the challenged ballots

discloses that they won the election.

THE BALLOTS CHALLENGED BY THE UNION

The Union challenged the ballots cast by Irmgard Cruz, Doris Kiser, Paul Owens, and Faye Phillips on the basis that they voted at an incorrect polling place. As previously noted, separate polling locations and voting times were established for striking and non-striking employees. The four employees challenged by the Union had participated in the strike but returned to work at the Employer about a week prior to the election.

While the Employer takes the position that the four employees are eligible voters, the Union contends that the four are not eligible to vote because they voted at a poll inside the plant rather than at the outside polling place established for striking employees. However, the Union admits it does not challenge their right to vote, but rather the

preferential treatment they received with respect to their voting location.

On the day of the election, these four employees were no longer engaged in an economic strike against their Employer since they had returned to work. Therefore, I find that it was proper for these employees to vote with other nonstriking employees rather than with those employees who remained on strike. Even assuming, arguendo, that these four employees voted at the wrong location, I do not find that such conduct thereby deprives them of their right to vote. In view of the foregoing, I find that Irmgard Cruz, Doris Kiser, Paul Owens, and Faye Phillips are eligible voters. I recommend that challenges to their ballots be overruled and that their ballots be opened and counted.

THE BALLOTS CHALLENGED BY THE EMPLOYER

After the strike commenced, a number of striking employees were referred to work by the Union for Casserole of Arizona at the Palo Verde Inn (hereinafter called the Inn), an isolated desert location about 50 miles west of Phoenix which provides room and board for those engaged in the construction of a nearby nuclear power plant. The Inn has a contract with the Union and James Schwake, the Inn's general manager, testified that it is questionable and doubtful that striking employees would have been hired if they had expressed an intention to return to the Employer at the conclusion of the strike. In addition to their wages, Inn employees receive either $7 or $9 per diem depending on the distance from their residence to the Inn.

Frances Buehner was not called to testify and the only information in the record regarding her employment at the Employer is that she

was employed for over a year as a packer. In addition, when she left the Employer she was earning about $3.93 per hour and if she had remained with the Employer, she would currently be earning $4.35. Buehner began working at the Inn around April 4, and is currently employed at $5 per hour as a sanitation worker in the dish room. She was hired on a temporary basis but was converted to a permanent employee in June. Striking employee Shirley Davis testified that Buehner told her she would return to work at the Employer with the Union.

Shirley Davis was employed by the Employer for four years as a lead stock clerk and was a Union shop steward. When she left the Employer she was earning $4.35 per hour and would currently be earning $4.83. On March 23, she was referred by the Union to work at the Inn where she is currently employed at $5 per hour as a food line server. In addition, she is a Union shop steward at the Inn. While

Schwake testified that Davis told him she did not intend to return to work at the Employer, Davis denied that she ever so informed Schwake. Davis lives one mile from the Employer and 51 miles from the Inn. She is involved in the committee coordinating the strike, has been active in picketing and hand-billing the Employer, and testified that she would return to the Employer with the Union.

Dorothy Florey was employed by the Employer for eight years as a lead packing clerk and was a Union shop steward at the Employer. She earned $4.55 per hour and would now be earning $5.12. On April 3, she was referred by the Union to work at the Inn where she is currently employed at $5.40 per hour as a lead food line server. While Schwake testified that Florey told him she would not return to the Employer, Florey denied she made any such remarks to Schwake. Florey lives seven miles from the Employer and 63 miles from the Inn. She is a member of the Union's negotiating

committee at the Employer and has been actively engaged in picketing, hand-billing, and telephoning employees in connection with the strike. She was number four on the Employer's seniority list and testified she intends to return to work at the Employer if the strike is settled.

Romae Hellum was employed by the Employer for over seven years as a packaging clerk where she earned $4.03 per hour and would currently be earning $4.55. On February 27, she was referred by the Union to work at the Inn where she is currently employed at $5 per hour in the housekeeping department. She has been actively engaged in picketing, hand-billing, and contacting other employees in regard to the strike. Hellum was number nine on the Employer's seniority list and lives 17 miles from the Employer and 49 miles from the Inn. Hellum testified that she intends to return to the Employer if the strike is satisfactorily settled and further testified that she so informed Jackie Hamilton, her super-

visor at the Inn. Hamilton corroborates Hellum's testimony.

Arthur Mayne was employed by the Employer for over 15 years as a lead shipper and was number one on the Employer's seniority list. He earned $4.55 per hour and would now be earning $5.12. On May 22, Mayne was referred by the Union to work at the Inn where he is currently employed at $5 per hour in the housekeeping department. Schwake testified that at one time, Mayne told him he didn't intend to return to the Employer. However, Jackie Hamilton, Mayne's immediate supervisor at the Inn, testified that while Mayne initially said he wouldn't return to the Employer, he later said that he would. Mayne was laid off by the Inn on June 25, but recalled to work around July 18. He had never been laid off at the Employer and was unemployed from the day of the strike until May 22. Mayne has picketed and handbilled at the Employer, lives 10 minutes from the Employer and over an hour

away from the Inn, and testified he would return to the Employer with the Union.

Cheryl Moore was employed by the Employer for three years as a machine operator where she earned $4.03 an hour and would now be earning $4.55. On March 20, she was referred by the Union to work at the Inn where she is currently employed at $5 per hour as a room-keeper. Jackie Hamilton, Moore's immediate supervisor at the Inn, testified that Moore told her she would return to the Employer if the strike settled and Moore testified that this is her intention. Moore has picketed and handbilled at the Employer and lives five minutes from the Employer but an hour from the Inn.

Marvin Pierce is another striking employee who did not testify. The only information in the record regarding his employment at the Employer is that he was employed for over a year as a lead custodian where he earned $4.38 per hour and would currently earn $4.93.

He was referred by the Union on February 20, to work at the Inn where he is currently employed at $5.20 per hour in the housekeeping department. According to Schwake, sometime in the spring, he asked Pierce if he intended to return to the Employer if the strike settled and Pierce replied he would not.

Leonard Shalongo was employed by the Employer for two years as a custodian where he earned about $4.18 per hour and would now be earning $4.70. On May 9, he was referred by the Union to the Inn where he is currently employed at $5.20 per hour in the housekeeping department. Shalongo testified that the Inn's management told him that his job was temporary and, while never laid off by the Employer, he was laid off for one week at the Inn. On his employment application at the Inn, Shalongo noted that to "better myself" was his reason for leaving the Employer but testified that if he had recorded "strike", he felt he would not

have gotten the job. He lives less than a mile from the Employer and 51 miles from the Inn. Shalongo testified that he has picketed and handbilled at the Employer since securing employment at the Inn and he would return to the Employer if the strike settled.

Rolene Wilshusen, a striking employee, was not called to testify and the only information in the record concerning her employment at the Employer is that she was employed for about one year as a machine operator where she earned $4.03 an hour and currently would earn $4.55. On March 10, she was referred by the Union to work as a desk clerk at the Inn where she is currently employed at $5.25 per hour. Schwake testified that at one time he asked Wilshusen if she intended to return to the Employer and Wilshusen said no. She lives 30 to 45 miles from the Inn and took off work time from the Inn to vote in the election.

Graciela Garcia and Juanita Garcia are sisters and were employed by the Employer for

about two years and one year, respectively. Graciela worked in the graphics department while Juanita worked in the print shop. Both began working at Sahara Industries on April 28, where they are currently employed doing assembly work at $3.60 per hour, which is less than they received at the Employer. Roy Herron, Sahara's comptroller, testified that both Graciela and Juanita told him that they planned to remain at Sahara; that Sahara has a policy of not hiring temporary employees; and that probably neither would have been hired if they had indicated they wished to return to the Employer when the strike was over. According to Graciela, Sahara is about 8 to 10 minutes from her home while the Employer is about 20 to 25 minutes away; she has not worked overtime at Sahara and has been sent home early on a couple of occasions for lack of work; and she wants to return to the Employer if it agrees to the Union's bargaining demands. Juanita asserts that on

a couple of occasions, she has been sent home early by Sahara for lack of work which never occurred at the Employer; she has received no overtime at Sahara while she worked some overtime at the Employer; and she intends to return to the Employer if the Union wins the strike.

Barbara Strottman, another striking employee, did not testify and the only information in the record concerning her employment at the Employer is that she was employed by the Employer for several years as a lead employee in packaging where she earned $4.55 per hour and would now be earning $5.12. She was hired by Sure Electronics on March 30, where she is currently employed at $5.37 per hour. Paul Todd, Sure's assistant personnel manager, testified that he would not have hired Strottman if she had indicated an intention to return to the Employer.

William McCall, another striking employee, was not called to testify and the only information in the record with respect to his employ-

ment at the Employer indicates that he had been employed two years as a machine mechanic earning $6 per hour and would now be earning at least $6.53. McCall was hired by Sure Electronics on March 16, and is currently employed at $7.74 per hour as a maintenance mechanic. According to Paul Todd, Sure's assistant personnel manager, McCall told him he did not intend to return to the Employer. However, Todd admitted that he would not have hired McCall if he had indicated an intention to return to the Employer.

Romaine Andries was employed by the Employer for over a year as a filler where he earned $4.16 an hour and would now be earning $4.68. Since March 16, Andries has been employed by ITT Hostess Cake as a thrift store clerk where he receives $4.67 per hour. On his employment application at ITT Hostess, Andries noted that "we are presently on strike for humane reasons and I have no intention of

returning. Will never cross picket line - want to better myself." Wally Lyons, ITT's district manager, testified that Teamsters Local 274 represents the company's employees and that he has been informed by another ITT official that Andries had joined that organization. Lyons further testified that Andries would not have been hired if he had said he might return to the Employer since ITT does not hire part time employees. According to Andries; he never joined Teamsters Local 274; he has maintained his membership in the Union; he told Lyons he had no intention of returning to the Employer without a union contract; he has picketed at the Employer; and he would return to the Employer if the strike was settled. Andries explained that on his ITT application he meant that he had no intention of crossing the picket line at the Employer. He states that he lives 6 miles from the Employer and 10 miles from the ITT store; his wife is currently employed outside the bar-

gaining unit at the Employer; and that he averages 32 hours of work per week at ITT while he averaged 40 hours at the Employer.

Deborah Brink, another striking employee, was not called to testify, and the only information in the record with respect to her employment at the Employer is that she was employed for about three months as an inspector where she earned $3.83 per hour and would currently earn $4.35. She began working for Arizona Public Service Corporation on February 2, where she is currently employed at about $5.50 per hour as a service order coordinator. Peter Joachin, a labor relations supervisor at Arizona Public Service, testified that Brink told him she intended to be a permanent employee and would not return to the Employer. However, Joachin added that if Brink had stated an intention to return to the Employer upon the conclusion of the strike, she would not have been hired.

Frederick LaMarche, another striking employee, was not called to testify and there is no information in the record concerning his employment with the Employer. According to Barbara Hanson, the Employer's personnel manager, around July 7, she telephoned another firm and was told that LaMarche was employed by that firm. However, there is no record evidence with respect to his employment by that firm. Hanson added that she telephoned LaMarche on three occasions, after the strike, to offer him a job different from the one he had prior to the strike and LaMarche declined these job offers indicating that he didn't wish to return to the Employer.

Rudy Villareal was employed by the Employer for about four months as a machine operator where he earned $4.03 per hour and would currently earn $4.55. On March 12, he was hired by Louisiana Pacific Corporation as a general helper where he is currently employed at $6.92 per hour. According to Theodore

Shepherd, a foreman at Louisiana Pacific, Villareal told Shepherd he would probably not return to the Employer. However, Shepherd added that he would have attempted to dissuade Villareal from seeking employment at Louisiana Pacific if Villareal had only desired work until the strike terminated. Villareal testified that he had been laid off twice at Louisiana Pacific, for one day each time, and has picketed at the Employer. While he joined the Paperworkers Union which represents employees at Louisiana Pacific, Villareal testified that he did so in order "to keep my job and to be treated right," 5/ and has not withdrawn his membership in the Union. Villareal claimed that on one occasion, he told the Employer's personnel manager that he would not return to the Employer but later left a message at the Employer that he would return if the strike was successful. Finally,

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5/ It should be noted that Arizona is a so called right-to-work state where union membership cannot be required.

Villareal testified that he would return to the Employer if the strike was settled and would accept less than the $6.92 he currently is paid.

Linda Westlake was employed by the Employer for three years as an inventory stock clerk at $4.03 per hour and would currently be earning $4.55. From March 1980, until April 1981, she worked almost full time as a production employee at a Jack-in-the-Box Restaurant while working at the Employer. In April 1981, Westlake became an assistant manager trainee at the restaurant and was promoted to an assistant manager on May 11, where she is currently employed at $4.91 per hour. Westlake testified that she wanted the position of assistant manager since it paid a higher wage, she was used to working two jobs, and she needed the extra money. She asserts that she wants to return to the Employer since she liked working there and needs the revenue from two jobs. Westlake

admitted she informed restaurant management that she would remain permanently as an assistant manager because she knew she would not get the job if she stated otherwise. Westlake has not resigned from the Union.

Doloris Vereb was employed by the Employer for a year and the Employer's personnel manager testified that she doesn't believe Vereb is employed elsewhere since she has been observed on the picket line almost daily. The personnel manager added that she contacted Vereb around July 8 and Vereb told her she was not interested in returning to work unless the Employer agreed to the Union's bargaining demands. Vereb testified that since the strike began, she has only worked a total of eight hours elsewhere and she intends to return to the Employer if the strike is settled.

Madalane McDonald was employed by the Employer for over a year. After the election, she informed the Employer that she was not

interested in returning unless the Employer agreed to the Union's bargaining demands. McDonald was not employed on the day of the election or at the time of the instant hearing.

Dahlila Marquez, a striking employee, was not called to testify and there is no information in the record concerning the nature of her employment with the Employer. The Employer's personnel manager testified that Marquez told her she was not currently employed and that she would not return to work unless the Employer agreed to the Union's bargaining demands.

Karen Roark, another striker, was not called to testify and there is no information in the record concerning her employment at the Employer. The Employer's personnel manager testified that she never discovered whether Roark was employed elsewhere. The personnel manager indicated that around July 8,

Roark told her she was not employed and was not interested in returning to work unless the Employer agreed to the Union's bargaining demands. Striking employee Hellum added that Roark is not employed elsewhere.

Velia Rodriguez was not called to testify and there is no record evidence concerning the nature of her employment at the Employer. Her cousin, striking employee Graciela Garcia, asserts that Rodriguez is unemployed.

In Pacific Tile and Porcelain Company, 137 NLRB 1358 (1962), the Board stated that an economic striker is presumed to continue in that status and thus is eligible to vote under Section 9(c)(3) of the Act where, as here, the election has been conducted within 12 months after the commencement of the strike. In order to rebut the presumption of eligibility, the party challenging the voter must affirmatively show by objective evidence that the economic striker has abandoned his interest

in his struck job. The Board noted that the nature of the evidence which might rebut the presumption would be determined on a case-by-case basis, but cautioned that "acceptance of other employment, even without informing the new employer that only temporary employment is sought, will not in itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote."

I find that all of the 24 above mentioned employees are economic strikers. With respect to striking employees currently employed at the Inn, Schwake testified that while some indicated they did not wish to return to the Employer, he further testified that it was questionable and doubtful that they would have been hired if they had expressed an intention to return to the Employer. While other current employers of striking employees indicated that the strikers made similar statements; they further indicated that based on company policy, such employees would not

have been hired if they had stated an intention to return to the Employer. A number of striking employees had been out of work for a substantial period of time and were in need of employment. They certainly would not jeopardize their opportunity to secure employment by stating that they would return to the Employer. Under these circumstances, the Board does not consider such statements by striking employees to their new employers to constitute sufficient evidence that they have abandoned the strike. Q-T Tool Company, Inc., 199 NLRB 500 (1972) and Roylyn, Inc., 178 NLRB 197 (1969).

In regard to striking employee LaMarche, only hearsay testimony was presented that he is employed elsewhere. While testimony was presented that on three occasions LaMarche informed the Employer that he would not return, LaMarche made the comments after being offered a job different from the one he previously occupied at the Employer. While I find some

significance in the fact that striking employee Villareal joined a different labor organization at his current employer, I note his explanation that it was an effort to keep his job and to be well treated by his new employer. Finally, only hearsay testimony was presented that striking employee Andries had joined a different labor organization and Andries denied such conduct. Finally, no evidence or testimony, whatsoever, was presented that striking employees Roark, Rodriguez, Marguez, McDonald or Vereb had found other employment or abandoned the strike.

I note that many of the striking employees are high on the Employer's seniority list, live close to the Employer but a long distance from their new jobs, have actively participated in the strike, receive slightly higher wages at their new employer, and testified they would return to the Employer with the Union and/or when the strike terminated. In Q-T Tool, supra; Roylyn, Inc., supra; and Akron

Engraving Company, Inc., 170 NLRB 232 (1968), the Board held that taking a new job at a higher rate of pay did not mean that striking employees had abandoned the strike. In Q-T Tool, supra, the Board noted that the long distance to the new job was a significant factor to indicate that striking employees had not abandoned the strike. In Akron Engraving, supra, the Board held that striking employees have not abandoned the strike merely because they qualified an intent to return with the provision that it be with a union contract. In view of the foregoing, and the entire record in this proceeding, I find that the Employer has not affirmatively shown by objective evidence that any of the economic strikers has abandoned his interest in his job. Accordingly, I recommend that the challenges to their ballots be overruled and that their ballots be opened and counted.

SUMMARY OF RECOMMENDATIONS

I recommend that all of the Employer's objections and all of the Union's objections be overruled in their entirety. I further recommend that the challenges to all 28 voters be overruled and that their ballots be opened and counted. I further recommend that the appropriate certification issue after the ballots of the 28 challenged voters have been opened and counted. 6/

Dated at Phoenix, Arizona, this 20th day of August, 1981.

/s/ Bruce R. Kettler
Hearing Officer
Bruce R. Kettler

6/ Within ten (10) days from the date of the issuance of this report, any party may file an original and one copy of exceptions with the Regional Director in Phoenix, Arizona. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy on the other party. If no exceptions are filed hereto, the Regional Director may adopt the recommendations of the Hearing Officer.

CONSTRUCTION
PRODUCTION &
MAINTENANCE
LABORERS'
UNION

June 27, 1981

TO THE EMPLOYEES OF CARTER GLOGAU

On Wednesday, July 1, 1981, you will be voting on a decertification petition filed by the management at CARTER-GLOGAU. It is an attempt by the company to remove the union which has represented the employees since 1972.

Management to date has evaded the real issues which is the deplorable treatment of the employees and has instead attempted to inject a smoke screen as to the leadership of Local # 383. WHY DOES MANAGEMENT PERPETRATE THIS FRAUD UPON YOU?

THE ISSUES WHICH CREATED THE STRIKE ON NOVEMBER 19, 1980 STILL REMAIN. Management has no respect for you as employees. They believe that you are pawns to be moved and

removed at their whim. You are told that your job is the most important item and your family, your health, your home, and your well-being and dignity do not mean a thing.

If you get sick - you shouldn't because the company demands that you must be present.

Many promises have been made to you by the company only to be broken and forgotten.

The company took away six (6) days per year of sick leave. We had twelve.

The company fraudulently claimed 15 cents per hour for additional vacation which doesn't exist.

The company refused to allow a good hospitalization plan which we feel is a must if you are to have proper health care without bankruptcy.

The company refused your pension while granting themselves a pension.

The company reneged on the grievance procedure which would bring management to arbitration to stay the abuse which existed

then and continues to exist. You are human beings and should be treated like human beings not like animals.

What about overtime? Management demands mandatory overtime and you must forget about your needs or your family needs. We demanded voluntary overtime.

The fill area employees are abused by a dictator supervisor. Even necessary health needs were denied. We again demanded human rights for those employees. Justice was denied.

Our attempt at equality for all employees was denied - our attempt for seniority rights were denied - our plea for a decent wage was denied - our demand that management be responsible for their own mistakes instead of blaming the workers or cover up their mistakes - denied.

Our demand for equality as to the escalating cost of living - denied.

Today you are receiving the fruit of the

Union effort. Without the Union you will return to minimum wage where you were in 1972.

A vote for the Union will continue the pressures for a workers agreement with protection for you and your family. A vote for the Union will continue the right for human rights and no dictatorship.

You need the Union protection against the tyrany of Ron Carter and his cronies.

Human dignity - equal rights - a living wage can only be achieved with your Union.

No more lies - no more broken promises - no more inhuman treatment - VOTE FOR YOUR NEEDS - <u>VOTE UNION</u>!

Don's let Mr. Carter pull the wool over your eyes the real issue is U. U will win if you are represented. U will lose if Mr. Carter can divide you.

VOTE FOR THE UNION, TOGETHER WE WILL WIN ON TO VICTORY, JUSTICE, AND HUMAN DIGNITY.

/s/ William Soltero
William Soltero
Business Manager

APPENDIX E

FILED
MAR 3 1981
W. J. FURSTENAW, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY /S/ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MILO V. PRICE, Regional Director for Region 28 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	No. CIV 81-165 PHX CLH
v.	)	
CONSTRUCTION, PRODUCTION & MAINTENANCE LABORERS' LOCAL UNION NO. 383, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,	)	ORDER GRANTING TEMPORARY INJUNCTION
Respondent.	)	

This cause came on to be heard upon the verified petition of Milo V. Price, Regional Director of Region 28 of the National Labor Relations Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations

Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, evidence, affidavits, briefs, arguments of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe the respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(1)(A) of said Act, affecting commerce within the meaning of Section 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record,

IT IS ORDERED, ADJUDGED, AND DECREED that, pending the final disposition of the matters involved in Case 28-CB-1710 pending before the National Labor Relations Board, respondent

Construction, Production & Maintenance Laborers' Local Union No. 383, Laborers' International Union of North America, AFL-CIO, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it, or them, be, and they hereby are enjoined and restrained from:

(a) Assaulting, or threatening to inflict, or inflicting, bodily harm or injury upon, or otherwise intimidating employees of Carter-Glogau, attempting to enter, to leave, or to work at Carter-Glogau's Glendale plant.

(b) Assaulting, or threatening to inflict, or inflicting, damage to the automobiles, trucks, or other vehicles being used by employees of Carter-Glogau seeking to enter, to leave, or to work at Carter-Glogau's Glendale plant.

(c) Engaging in picketing or patrolling so as to block or otherwise impede employees of Carter-Glogau, or of any person

having business with Carter-Glogau, from entering, leaving, or working at Carter-Glogau's Glendale plant;

(d) Placing nails or obstructions of any kind on or across the entrances leading to, or at the parking facilities of Carter-Glogau's Glendale plant.

(e) Making obscene remarks and gestures to employees of Carter-Glogau as they enter, leave, or work at Carter-Glogau's Glendale plant;

(f) Letting the air out of the tires or otherwise damaging the tires of vehicles used by employees of Carter-Glogau seeking to work at Carter-Glogau's Glendale plant;

(g) Taking pictures of, or writing down the license plate numbers of, vehicles used by employees of Carter-Glogau seeking to enter, to leave, or to work at Carter-Glogau's Glendale plant;

(h) Threatening employees that their families would be harmed because such employees

work behind respondent's picket line at Carter Glogau's Glendale plant; or

(i) In any other manner, or by any other means, restraining or coercing employees of Carter-Glogau in the exercise of their rights to self-organization, to form, to join, or to assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, as guaranteed under Section 7 of the National Labor Relations Act, as amended.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that respondent Construction, Production & Maintenance Laborers' Local Union No. 383, Laborers' International Union of North America, AFL-CIO, within three days from the date of this injunction, provide each member of the bargaining unit at Carter-Glogau's Glendale plant and each person picketing that

plant with a copy of this temporary injunction and give to each member of the bargaining unit and to each picketer clear and precise written instructions, orders and directions to specifically refrain from engaging in any of the conduct herein enjoined and to take reasonable steps to see that such instructions, orders and directions are enforced and complied with.

DATED this 2 day of March, 1981.

/S/
CHARLES L. HARDY
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

APPENDIX F

FILED
APR 9 1982
PHILLIP B. WINBERRY
CLERK, U. S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILO V. PRICE, Regional Director for Region 28 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD Petitioner - Appellee, vs. CONSTRUCTION, PRODUCTION & MAINTENANCE LABORERS' LOCAL UNION 383, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO Respondent - Appellent.	No. 81-5382 D.C. #CIV 81-165 CLH MEMORANDUM

Submitted: December 15, 1981

Decided: April , 1982

On Appeal From an Order of the
United States District Court
for the District of Arizona
Charles L. Hardy, District Judge, Presiding

Before: SCHROEDER and POOLE, Circuit Judges and KELLEHER,* District Judge

Construction, Production & Maintenance Laborers' Local Union 383 (the Union) appeals from a preliminary injunction issued against it under § 10(j) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 160(j), based on a complaint by the regional director charging that Union picketers violated § 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(1)(A). The Union claims that the district court erred in not holding an evidentiary hearing to determine whether "reasonable cause" existed to believe that unfair labor practices were occurring; that it abused its discretion in finding that an injunction was "just and proper" under § 10(j); and that the injunction itself was overbroad.

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*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

Under § 10(l) of the LMRA "reasonable cause" exists when the factual allegations and legal propositions underlying the Regional Director's petition are not insubstantial and frivolous. Kennedy v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 542, 443 F.2d 627, 630 (9th Cir. 1971); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 546 (9th Cir. 1969). This court need not resolve the issue whether the evidentiary standard for determining "reasonable cause" under § 10(j) differs from that under § 10(l) since we conclude that even if a higher standard was applicable, there was sufficient evidence presented here to satisfy it.

The Board's affidavits set forth in ample non-hearsay, nonconclusory terms that union stewards, picket captains and pickets acting under their supervision blocked the entrance to the employer's plant, damaged vehicles of non-striking employees, threatened non-striking employees with bodily harm, used intimidating

tactics, and on one occasion struck a non-striker. Furthermore, the Union submitted no affidavits or documentary evidence to contest the Board's claims and therefore made no showing that an evidentiary hearing would aid the court.

Injunctive relief was appropriate in this case. A central purpose of the LMRA is to prevent the use and threats of violence to coerce employees. Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 744 (7th Cir. 1976). The district court therefore did not abuse its discretion in finding that issuance of an injunction was "just and proper".

AFFIRMED.

APPENDIX G

RECEIVED
JUN 28 1984
SNELL & WILMER

FILED
JUN 25 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. CARTER-GLOGAU LABORATORIES, INC., Respondent.	)	Nos. 83-7092/7124 ORDER

Petition for Enforcement of an Order of the National Labor Relations Board

Before: ANDERSON, SKOPIL, and FERGUSON, Circuit Judges

Judges Skopil and Ferguson have voted to deny petitioner's motion for leave to file an amended petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and

the suggestion for rehearing en banc is rejected.

Judge Anderson dissents from the denial of petitioner's motion to file an amended petition for rehearing. Judge Anderson would grant that motion, would grant rehearing by the panel, deny enforcement, and remand to the Board for reconsideration in light of its decision in YKK (U.S.A.) Inc., 269 NLRB No. 8. See NLRB v. Anchorage Times Pub. Co., 637 F.2d 1359 (9th Cir. 1981).

ORDER - 1